

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

2002 Biennial Regulatory Review – Review of)	
the Commission's Broadcast Ownership Rules)	MB Docket No. 02-277
and Other Rules Adopted Pursuant to Section)	
202 of the Telecommunications Act of 1996)	
)	
Cross-Ownership of Broadcast Stations and)	MM Docket No. 01-235
Newspapers)	
)	
Rules and Policies Concerning Multiple)	MM Docket No. 01-317
Ownership of Radio Broadcast Stations in)	
Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244
)	

COMMENTS OF

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SUMMARY

The Commission has maintained limits on ownership of broadcast stations for over 60 years in the belief that structural regulation *may* be more effective than the marketplace in achieving its goals of diversity, competition and localism. The Commission now recognizes that the modern media marketplace is far different from the media world of 60 years ago when the first rules were adopted and that, in the wake of the Telecommunications Act of 1996, mere supposition is insufficient to sustain broadcast ownership regulation.

Quite correctly, the Commission formulates as the central issue in this proceeding whether it can justify retention of its ownership regulations given the dramatic increases in media competition in recent decades. The answer to this query clearly is "no." A cursory look at two markets, one very large and one very small, graphically illustrates that the marketplace today bears no resemblance to the media world that the Commission set out to structure through ownership regulations.

In 1960, the media options of a Washington, D.C. resident included two dozen broadcast stations, three daily newspapers and magazines. Today, a Washington, D.C. resident can choose from 65 broadcast stations and a myriad of video, audio and print options:

WASHINGTON D.C. MEDIA OPTIONS

<u>MEDIA OUTLET</u>	<u>1960</u>	<u>2002</u>
<u>VIDEO:</u>	<ul style="list-style-type: none"> • 4 full-power broadcast TV stations • movies 	<ul style="list-style-type: none"> • 15 full-power broadcast TV stations • 7 low-power broadcast TV stations • 150 plus channels from cable TV (including one 24-hour local cable news channel) • 300 plus channels offered by DBS • Internet – thousands of streaming video feeds • movies, DVDs, VCRs, PVRs
<u>AUDIO:</u>	<ul style="list-style-type: none"> • 20 full-power broadcast radio stations • record albums 	<ul style="list-style-type: none"> • 50 full-power broadcast radio stations • 100 or more satellite radio channels • 2 low-power FM broadcast radio stations • Internet – thousands of streaming audio sites • CDs, MP3s, cassettes
<u>PRINT MEDIA:</u>	<ul style="list-style-type: none"> • 3 metropolitan daily newspapers • 7 neighborhood/suburban, local daily newspapers • 15 neighborhood/suburban local weekly papers • 1 national newspaper • at least 750 national weekly and monthly magazines 	<ul style="list-style-type: none"> • 2 metropolitan daily newspapers • at least 9 neighborhood/suburban, local daily newspapers • 78 neighborhood/suburban local weekly newspapers • at least 20 national and international newspapers • Internet – thousands of Web sites and online editions of newspapers • approximately 4,500 national weekly and monthly magazines • at least 25 local monthly magazines
<u>INTER- PER- SONAL COMMUNI- -CATION:</u>	<ul style="list-style-type: none"> • face-to-face contact • mail • home phone 	<ul style="list-style-type: none"> • face-to-face contact • mail • home phone • cell phone • Internet – email, instant messages, chat rooms • FAX

The explosion of media options has been no less dramatic in very small markets, such as Burlington, Vermont/Plattsburgh, New York. In 1960, a Burlington-area resident had a handful of broadcast options, one daily newspaper and magazines. Today, residents can turn to any of 45 broadcast stations and the same dizzying array of video, audio and print options available to large market residents.

BURLINGTON, VT/PLATTSBURGH, NY MEDIA OPTIONS

<u>MEDIA OUTLET</u>	<u>1960</u>	<u>2002</u>
<u>VIDEO:</u>	<ul style="list-style-type: none"> • 2 full-power broadcast TV stations • movies 	<ul style="list-style-type: none"> • 10 full-power broadcast TV stations • 6 low-power broadcast TV stations • 150 plus channels from cable TV • 300 plus channels offered by DBS • Internet – thousands of streaming video feeds • movies, DVDs, VCRs, PVRs
<u>AUDIO:</u>	<ul style="list-style-type: none"> • 15 full-power broadcast radio stations • record albums 	<ul style="list-style-type: none"> • 35 full-power broadcast radio stations • 100 or more satellite radio channels • Internet – thousands of streaming audio sites • CDs, MP3s, cassettes
<u>PRINT MEDIA:</u>	<ul style="list-style-type: none"> • 2 metropolitan daily newspapers • approximately 5 neighborhood/suburban, local weekly papers • 1 national newspaper • at least 750 national weekly and monthly magazines 	<ul style="list-style-type: none"> • 2 metropolitan daily newspapers • at least 20 neighborhood/suburban, local weekly newspapers • at least 20 national and international newspapers • Internet – thousands of Web sites and online editions of newspapers • approximately 4,500 national weekly and monthly magazines • at least 18 local monthly magazines
<u>INTER- PERSONAL COMMUNI- CATION:</u>	<ul style="list-style-type: none"> • face-to-face contact • mail • home phone 	<ul style="list-style-type: none"> • face-to-face contact • mail • home phone • cell phone • Internet – email, instant messages, chat rooms • FAX

The impact of the Internet on the media marketplace and, more specifically, the marketplace of ideas, cannot be overstated. As the tables above illustrate, the Internet affects every aspect of the media world from video and audio to print media and interpersonal communications. Yet these tables hardly do justice to the revolutionary impact the Internet has had on media:

- It has created a readily accessible platform for the dissemination of ideas, both popular and unpopular;
- It has transformed one of the most important sources of viewpoint formation – interpersonal communications – by permitting individuals to communicate almost instantaneously around the world at virtually no cost,

fostering reliance on friends and family members in shaping viewpoints on topics ranging from which used car to purchase to whether the U.S. should go to war;

- It has enhanced the usefulness of all media by allowing continually updated information to flow freely to the consumer and, perhaps more importantly, by permitting consumers to interact with the media source instantaneously, thereby empowering the media consumer; and
- It is available to virtually all Americans – even since the initiation of this proceeding, prices of Internet-ready computers have dropped to levels approaching the cost of a television set. In addition, dial-up Internet access is widely available for less than \$10 per month. Internet access is also available for free in schools, public libraries and the workplace.

As the Commission recognizes, it must analyze the modern media marketplace and the need for structural regulation in light of the presumption set forth in the 1996 Act for repeal or modification of the rules. The Joint Commenters submit that the time has come for the Commission to abandon the media ownership regulatory scheme in its entirety.

In his attached statement, renowned economist Dr. Bruce Owen demonstrates that proper application of antitrust law to ensure competitive economic markets will necessarily maintain a robust and competitive marketplace of ideas. As Dr. Owen explains:

- Economic markets are narrower and more concentrated, and the barriers to entry much higher than in the marketplace of ideas; and
- *The antitrust laws will prohibit consolidation in economic markets long before it can become a threat to competition in the marketplace of ideas and, therefore, no structural media ownership regulations are required to achieve the Commission's policy goals.*

In imposing limits on broadcast ownership that go beyond the requirements of the antitrust laws, the Commission assumes that promotion of outlet diversity advances viewpoint diversity. The Commission itself now questions this assumption, and both economic theory and empirical evidence demonstrate that *the existing rules not only fail to foster the Commission's goals of diversity, competition and localism, they are often counterproductive.* Multiple owners have

incentives to diversify both programming and viewpoints, and as a result do not speak with a single, monolithic voice.

The Commission's focus, moreover, on news and public affairs programming as the sole measure of viewpoint diversity fails to account for the contribution of entertainment programming to the public debate on important issues and is constitutionally suspect. Commission examination of content raises particularly troubling First Amendment issues in light of the transformation of the media marketplace. Given the overwhelming wealth of both broadcast and non-broadcast media options available to consumers today, the factual underpinnings of the spectrum scarcity rationale of broadcast regulation, established over 30 years ago in *Red Lion Broadcasting Co. v. FCC*, no longer are valid (if they ever were).

In today's media marketplace, the Commission can safely rely on the antitrust laws to ensure that its policy goals are well-served. If the Commission harbors any residual doubt (and the Joint Commenters believe that it should have none) as to the efficacy of competition laws, the Commission should only consider regulation which would serve as a safety net for outlet diversity. Any rule should be technology-neutral, and should take into account not only broadcast stations and daily newspapers, but all modern media, including the Internet, cable television/DBS, weekly newspapers and regional magazines, each of which should receive equal weight as sources of outlet diversity. In a world where a lone Internet journalist can break a story that leads to impeachment of the President, it makes little sense to weight outlets based on current audience size or revenue share.

The Joint Commenters applaud the Commission for its commitment to conduct a top-to-bottom re-examination of its media structural ownership regulations – "a process of almost Copernican scope." Continued regulation of the broadcast media, only one sector in a vast media

universe, unfairly and unnecessarily constrains very able and effective competitors and stifles innovation. The dictates of the 1996 Act mandate repeal of the rules; the exigencies of the marketplace warrant the promptest possible Commission action.

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JOINT COMMENTERS' NEWS PROGRAMMING EXHIBITS

1. Fox Entertainment Group, Inc. and Fox Television Stations, Inc.
2. National Broadcasting Company, Inc. and Telemundo Communications Group, Inc.
3. Viacom

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**COMMENTS OF FOX ENTERTAINMENT GROUP, INC. AND FOX TELEVISION
STATIONS, INC., NATIONAL BROADCASTING COMPANY, INC. AND
TELEMUNDO COMMUNICATIONS GROUP, INC., AND VIACOM**

Fox Entertainment Group, Inc. and Fox Television Stations, Inc. ("Fox"), National Broadcasting Company, Inc. and Telemundo Communications Group, Inc. ("NBC/Telemundo"), and Viacom (collectively the "Joint Commenters") hereby submit their comments in response to the September 23, 2002 *Notice of Proposed Rulemaking*¹ initiating a comprehensive review of the media ownership rules in accordance with the biennial review requirements of Section 202(h) of the Telecommunications Act of 1996.² The Joint Commenters also offer their comments on certain of the 12 studies prepared for the Commission's Media Ownership Working Group,

¹ See *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, FCC 02-249 (released September 23, 2002) ("*Notice*").

² Telecommunications Act of 1996, Pub. L. No. 104-104 (1996), § 202(h) ("1996 Act").

which the Commission indicated are intended to inform the Commission's biennial review.³ In addition, the Joint Commenters present eight economic studies in response to the Commission's call for factual evidence. The Joint Commenters commend the Commission for its acknowledgment that the media markets have undergone enormous changes since adoption of the Commission's ownership policies and rules. The Joint Commenters submit that a thorough evaluation of the dramatic changes that have occurred in the media marketplace compels the conclusion that no regulation of media ownership is required other than the antitrust laws.

I. GIVEN THE EXTRAORDINARY DIVERSITY AND COMPETITIVENESS OF TODAY'S MEDIA MARKETPLACE AND THE DEREGULATORY MANDATE OF THE 1996 ACT, THE TIME HAS COME FOR THE COMMISSION TO ABANDON STRUCTURAL MEDIA OWNERSHIP REGULATION

The Commission correctly recognizes in the *Notice* that the media marketplace has changed "dramatically" over the last few decades and is today more competitive and diverse than ever.⁴ The Commission also notes that "[r]ecent court decisions have held that Section 202(h) changes the way the Commission must evaluate its broadcast ownership rules . . . [because this provision] *carries with it a presumption in favor of repealing or modifying the ownership rules.*"⁵ These two factors – a radically transformed media marketplace and a mandate for change in the way the Commission regulates that marketplace – present the FCC and the public with an extraordinary challenge and opportunity. Fortunately, the Commission has distilled what might otherwise be an unmanageable endeavor into a concise analytical framework: "[W]e must first determine whether the marketplace provides a sufficient level of competition to protect and

³ See *FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadline for 2002 Biennial Regulatory Review of Commission's Ownership Rules*, Public Notice (October 1, 2002) ("*Ownership Studies*"). Individual studies are referred to by their study number.

⁴ *Notice* at ¶ 4.

⁵ *Notice* at ¶ 3 (emphasis added).

advance our policy goals. If not, we must determine whether the existing rules or revisions to those rules are required to protect and advance diversity, competition, and localism in the media marketplace."⁶

The overwhelming weight of the evidence suggests that today's extraordinarily vast and exceptionally diverse media marketplace provides more than enough competition to ensure that the Commission's policy goals will be met, even in the absence of media-specific ownership rules. In short, the Commission can answer its first inquiry affirmatively – today's media marketplace is sufficiently competitive to protect the Commission's policy goals – and need not address the second inquiry concerning which rules might be required to protect those goals. In other words, the Commission can abandon the current regulatory framework in its entirety and still rest assured that its policy goals will be well-served.

Before examining the many ways in which today's media marketplace operates to ensure diversity, competition and localism, we discuss the meaning and import of the presumption set forth in Section 202(h) of the 1996 Act in order to explicate fully the impact of the deregulatory mandate the Commission has received from Congress. No matter how the precise contours of the presumption are defined, there is no longer any public interest need served by the Commission's media ownership rules – in fact, the rules frequently undermine rather than advance the Commission's policy goals.

A. The FCC Properly Recognizes that Section 202(h) Carries a Presumption in Favor of Repeal or Modification of the Commission's Media Ownership Rules

Section 202(h) of the 1996 Act directs the FCC to repeal or modify any media ownership rule that is no longer "necessary in the public interest as the result of competition." The

⁶ Notice at ¶ 31.

Commission acknowledges in the *Notice* that Section 202(h) "fundamentally changed broadcast ownership law"⁷ and that appellate courts have held that Section 202(h) carries with it "a presumption in favor of repealing or modifying the ownership rules."⁸ Indeed, the United States Court of Appeals for the District of Columbia Circuit in both *Fox Television Stations, Inc. v. FCC*,⁹ and *Sinclair Broadcast Group, Inc. v. FCC*,¹⁰ relied upon this Congressionally-mandated presumption in vacating and remanding the ownership rules at issue in those cases. The Court vindicated the view expressed by Commissioner (now Chairman) Powell in his dissenting statement in the *1998 Biennial Review Order* that Congress has set the FCC on a deregulatory course:

I believe the clear bent of the biennial review process set out by Congress is deregulatory, in recognition of the pace of dramatic change in the marketplace and the understanding that healthy markets can adequately advance the government's interests in competition and diversity. Thus . . . I start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity.¹¹

While the presumption itself is not in dispute, there is some question as to the proper interpretation of the phrase "necessary in the public interest as the result of competition." The Commission highlights this issue in the *Notice* with the following two questions:

For example, does the phrase, "necessary in the public interest," mean we must repeal a rule unless we find it to be indispensable? Or does the phrase mean that we can retain a rule if we would be justified under the current circumstances in

⁷ *Notice* at ¶ 3.

⁸ *Notice* at ¶ 3.

⁹ 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox*"), *rehearing granted in part*, 293 F.3d 537 (D.C. Cir. 2002) ("*Fox Rehearing Decision*").

¹⁰ 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*").

¹¹ *In Re 1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058 (2000) (Separate Statement of Commissioner Michael K. Powell) ("*1998 Biennial Review Order*").

adopting it in the first instance because the record shows that it serves the public interest?¹²

Under either interpretation of the phrase the media ownership rules warrant repeal. Even under the more relaxed standard, the dramatic changes in the marketplace leave no doubt that these rules – some of which date back 60 years – cannot be justified in any way as serving the public interest. Indeed, our detailed analysis of several of the media ownership rules set forth in Section II below demonstrates that these media-specific ownership regulations actually *undermine* many of the FCC's public interest goals.

Although the existing rules cannot be justified under any reasonable reading of Section 202(h), the Joint Commenters have undertaken a detailed analysis of that statutory provision in Exhibit 1 to these comments in response to the FCC's request in the *Notice*.¹³ The *Statutory Analysis* demonstrates that proper application of time-honored principles of statutory construction leads inescapably to the conclusion that "necessary" means required or indispensable and not merely useful or appropriate.¹⁴ Accordingly, media ownership regulations should be retained only if they are required or indispensable to serve the public interest.

¹² *Notice* at ¶ 18.

¹³ See Exhibit 1, *Statutory Analysis: Legal Standards Governing the FCC's Mass Media Biennial Review Proceedings* ("Statutory Analysis").

¹⁴ "Something is *necessary* if it is *required* or *indispensable* to achieve a certain result." *GTE v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000) (emphasis added); see also *Fox*, 280 F.3d at 1050; *Statutory Analysis* at 11-18. Although the D.C. Circuit found on rehearing that a determination regarding the precise meaning of the phrase "necessary in the public interest" was not essential to its decision concerning the rules at issue in that case, the court specifically rejected the Commission's argument that "necessary" means nothing more than "useful" or "appropriate." See *Fox Rehearing Decision*, 293 F.3d at 540; *Statutory Analysis* at 5-6; see *id.* at 6, n. 25 (citing statements of Commissioner Kevin Martin that "the term 'necessary' should be read in accordance with its plain meaning, to mean something closer to 'essential.'").

B. In View of Today's Immense, Enormously Diverse and Universally Accessible Media Marketplace, Unfettered Competition in that Marketplace, Coupled with Proper Application of Competition Laws, Will Ensure that the FCC's Policy Goals Are Realized

As noted above, the Commission's analytical framework requires it first to determine whether today's media marketplace provides a sufficient level of competition to protect and advance its policy goals of diversity, competition and localism. If the Commission answers this inquiry in the affirmative, as the Joint Commenters believe that it should, the Commission must dispense with all media ownership regulations. The *Notice* raises an antecedent issue, however, when it seeks to "define more precisely the Commission's policy goals,"¹⁵ and, to the Commission's credit, challenges many of the fundamental assumptions underlying those policy goals to test their continued validity and relevance in today's media marketplace. The Joint Commenters generally support the Commission's primary policy goals as articulated in the *Notice* but, as discussed in detail below, believe that the modern media marketplace is so ferociously competitive and extraordinarily diverse that these policy goals will be automatically satisfied as a matter of course through the operation of market forces and competition laws.

1. Viewpoint Diversity, Correctly Defined, Should Remain the "Touchstone" of the Commission's Policy Goals

Of all the policy goals identified by the Commission in the *Notice*, one stands out as the "touchstone" of the Commission's media ownership rules and policies: viewpoint diversity.¹⁶ The Joint Commenters believe that viewpoint diversity is a worthy goal. In this regard, we share the Commission's sentiment that "[t]he diversity of viewpoints, by promoting an informed

¹⁵ *Notice* at ¶ 29.

¹⁶ *Notice* at ¶ 35.

citizenry, is essential to a well-functioning democracy"¹⁷ and applaud the Commission's commitment "to preserving citizens' *access* to a diversity of viewpoints through the media."¹⁸

The three other aspects of the diversity policy goal – outlet diversity, source diversity and program diversity – have each been identified not as goals in themselves but as means to serve the viewpoint diversity goal.¹⁹

With respect to outlet diversity in particular, the Commission has "long assumed that diffusing ownership of outlets promotes a wide array of viewpoints."²⁰ In the Commission's view, outlet diversity serves as a proxy for viewpoint diversity and "a major benefit of content-neutral structural regulation is that [the Commission] avoid[s] making inescapably subjective judgments about editorial decisions, viewpoints and content."²¹ The *Notice*, however, appropriately questions the Commission's assumption concerning the relationship between outlet diversity and viewpoint diversity.²² The Joint Commenters, as discussed below, believe that this long-standing assumption is both theoretically and empirically suspect.²³

¹⁷ *Notice* at ¶ 35.

¹⁸ *Notice* at ¶ 35 (emphasis added).

¹⁹ *See Notice* at ¶ 41.

²⁰ *Notice* at ¶ 36.

²¹ *Notice* at ¶ 36.

²² *See Notice* at ¶ 41.

²³ *See In Re Cross-Ownership of Broadcast Stations and Newspapers, Newspaper/Radio Cross-Ownership Waiver Policy*, 16 FCC Rcd 17,283 (2001) ("*NBCO Proceeding NPRM*"), at ¶ 2. In the *NBCO Proceeding NPRM*, the Commission recognized that, in promulgating the newspaper/broadcast cross-ownership rule, it assumed – without relying on empirical evidence – that outlet diversity serves as a proxy for viewpoint diversity. *Id.*; *see also FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 786 (1978) ("In the Commission's view, the conflicting studies . . . concerning the effects of newspaper ownership on competition and station performance were inconclusive The prospective rules were justified, instead, by reference to the Commission's policy of promoting diversification of ownership"). In light of the strict deregulatory bent of Section 202(h), however, the Commission no longer can rely on mere supposition to support its media ownership rules.

The Joint Commenters submit, moreover, that viewpoint diversity is not just about news. Although, as the *Notice* indicates, "[t]he airing of news and public affairs programming has traditionally been the focus of viewpoint diversity,"²⁴ the Commission should take this opportunity to conclude that all forms of programming contribute (and have long contributed) to viewpoint diversity.

For example, the situation comedies *Will & Grace* and *Ellen* routinely focus attention on issues concerning sexual orientation and have furthered public awareness of this important topic, while shows such as *All in the Family* and *The Cosby Show* have broken down barriers by challenging racial stereotypes. Similarly, the comedy *Murphy Brown* fostered a political and cultural debate regarding a successful professional having a child out of wedlock. Late-night talk programs like *The Late Show With David Letterman* and *The Tonight Show With Jay Leno* often address important social and political issues through biting satire and humor.²⁵ And programming could not deal with more wrenching and profound issues than the movie *Schindler's List* – which NBC aired free of commercial interruption in view of the gravity and sensitivity of the topic. In addition, cable's Lifetime network is devoted to entertainment and other programming that address issues of importance to women. Talk programming represents yet another source of tremendous viewpoint diversity with shows like *The O'Reilly Factor* and *Donahue*, both of which directly address contrasting viewpoints on the air. And the Commission appropriately asks whether shows such as *60 Minutes* (technically a "magazine show") and

²⁴ *Notice* at ¶ 40.

²⁵ According to a Pew Foundation poll taken during the 2000 campaign season, one in ten Americans routinely gleaned information about the presidential race from late-night comedy shows. See Peter Marks, *The 2000 Campaign: The Comedian*, *The New York Times*, at A-15 (July 21, 2000); Laura Dempsey, *Politics Marries Show Biz*, *The Dayton Daily News*, at 1C (November 4, 2000).

Hardball (technically a "talk show") contribute to viewpoint diversity;²⁶ the Joint Commenters believe that these programs undoubtedly contribute to viewpoint diversity, perhaps even more so than traditional newscasts. In short, as a purely factual matter, news and public affairs programming should not be the sole focus of the Commission's viewpoint diversity concerns because a wide range of programs contribute to viewpoint diversity.

Moreover, Commission examination of the content of programming raises troubling First Amendment issues and, in this regard, the *Notice* seeks comment on the standard of review which should be applied to any new media ownership restrictions adopted in this proceeding.²⁷ The Joint Commenters believe that any media ownership restrictions, including restrictions on broadcasters, must meet at least the *O'Brien*, or intermediate scrutiny, test.²⁸ The factual underpinnings of the spectrum scarcity rationale, established in *Red Lion Broadcasting Co. v. FCC*,²⁹ clearly are no longer valid (if they ever were). Because this proceeding will bring into focus the overwhelming wealth of both broadcast and non-broadcast media options available to consumers today, the Commission should accept the Supreme Court's long-standing invitation in *FCC v. League of Women Voters* to acknowledge that "technological developments have advanced so far that some revision of the system of broadcast regulation may be required."³⁰

The remaining two policy goals that the Commission seeks to serve by its media ownership regulations are localism and competition. With respect to localism, the FCC has implicitly acknowledged that market forces provide powerful incentives for group owners to

²⁶ See *Notice* at ¶ 40.

²⁷ See *Notice* at ¶ 22.

²⁸ See *U.S. v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*").

²⁹ 395 U.S. 367 (1969) ("*Red Lion*").

³⁰ 468 U.S. 364, 376, n.11 (1984).

satisfy the local news and information needs of the communities they serve. Thus, the *Ownership Studies*, discussed in greater detail below, demonstrate that network-owned stations are consistently among the best and most reliable providers of local programs.³¹ Given that economic imperatives drive all media owners to cover local events and developments, properly functioning markets will ensure that this policy goal is achieved. As the Joint Commenters demonstrate below, application of the antitrust laws alone is sufficient to serve the Commission's competition goal (as well as all other policy goals the Commission seeks to achieve).

2. The Modern Media Marketplace Provides Consumers with a Vastly Increased Number of Media Outlets, All of Which Are More Accessible than Ever Before

Today's media consumers have access to a far more diverse and substantially more competitive array of content options than were available decades ago when the Commission was formulating its structural ownership regulations. The increase in the number of broadcast stations alone has been astounding. In fact, Americans now have access to more than twice as many television stations as they did in 1969, the year the Supreme Court decided *Red Lion*.³² Today's consumers also have a dizzying array of alternative media choices unavailable 40 years ago. Cable was merely a fledgling industry in the 1960s, and direct broadcast satellite service ("DBS") was nonexistent. Today, both are powerful participants in the media marketplace, with a combined nationwide customer base approaching 90 percent of all American television households.³³ Moreover, a wide assortment of print media, from newspapers to magazines to books, continue to be available to media consumers – only now in greater numbers than ever

³¹ See *infra*, Section II.

³² See *Television Stations On Air, Warren's Television & Cable Factbook, 2002 Edition*, at C-1.

³³ See *In Re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Ninth Annual Report, FCC 02-338 (released December 31, 2002) ("*Video Competition Report*"), at Appendix B.

before. Perhaps the most dramatic development, however, has been the advent and widespread adoption of the Internet and its millions of Web sites. Study #8, furthermore, demonstrates that consumers are utilizing the wide variety of media available to them to obtain both local and national news and information.³⁴

Today's consumers have access to, and readily make use of, a multitude of diverse content choices that contribute to their viewpoint formation. For example, a media consumer in Washington, D.C. had a handful of media options in 1960, but today has literally hundreds of alternatives from which to choose:

³⁴ See Nielsen Media Research, *Consumer Survey On Media Usage*, September 2002 ("Study #8"), at Table 001 and Table 009 (indicating that statistically significant numbers of consumers use television, newspapers, radio, the Internet and magazines to obtain local and national news and information).

WASHINGTON D.C. MEDIA OPTIONS³⁵

<u>MEDIA OUTLET</u>	<u>1960</u>	<u>2002</u>
<u>VIDEO:</u>	<ul style="list-style-type: none"> • 4 full-power broadcast TV stations • movies 	<ul style="list-style-type: none"> • 15 full-power broadcast TV stations • 7 low-power broadcast TV stations • 150 plus channels from cable TV (including one 24-hour local cable news channel) • 300 plus channels offered by DBS • Internet – thousands of streaming video feeds • movies, DVDs, VCRs, PVRs
<u>AUDIO:</u>	<ul style="list-style-type: none"> • 20 full-power broadcast radio stations • record albums 	<ul style="list-style-type: none"> • 50 full-power broadcast radio stations • 100 or more satellite radio channels • 2 low-power FM broadcast radio stations • Internet – thousands of streaming audio sites • CDs, MP3s, cassettes
<u>PRINT MEDIA:</u>	<ul style="list-style-type: none"> • 3 metropolitan daily newspapers • 7 neighborhood/suburban, local daily newspapers • 15 neighborhood/suburban local weekly papers • 1 national newspaper • at least 750 national weekly and monthly magazines 	<ul style="list-style-type: none"> • 2 metropolitan daily newspapers • at least 9 neighborhood/suburban, local daily newspapers • 78 neighborhood/suburban local weekly newspapers • at least 20 national and international newspapers • Internet – thousands of Web sites and online editions of newspapers • approximately 4,500 national weekly and monthly magazines • at least 25 local monthly magazines
<u>INTER- PER- SONAL COMMUNI- -CATION:</u>	<ul style="list-style-type: none"> • face-to-face contact • mail • home phone 	<ul style="list-style-type: none"> • face-to-face contact • mail • home phone • cell phone • Internet – email, instant messages, chat rooms • FAX

³⁵ Washington, D.C. is the 8th largest Nielsen DMA and the 8th largest Arbitron market. See Exhibit 2 for sources.

The explosion of media options since 1960 is no less dramatic in a small market such as Burlington, Vermont/Plattsburgh, New York:

BURLINGTON, VT/PLATTSBURGH, NY MEDIA OPTIONS³⁶

<u>MEDIA OUTLET</u>	<u>1960</u>	<u>2002</u>
<u>VIDEO:</u>	<ul style="list-style-type: none"> • 2 full-power broadcast TV stations • movies 	<ul style="list-style-type: none"> • 10 full-power broadcast TV stations • 6 low-power broadcast TV stations • 150 plus channels from cable TV • 300 plus channels offered by DBS • Internet – thousands of streaming video feeds • movies, DVDs, VCRs, PVRs
<u>AUDIO:</u>	<ul style="list-style-type: none"> • 15 full-power broadcast radio stations • record albums 	<ul style="list-style-type: none"> • 35 full-power broadcast radio stations • 100 or more satellite radio channels • Internet – thousands of streaming audio sites • CDs, MP3s, cassettes
<u>PRINT MEDIA:</u>	<ul style="list-style-type: none"> • 2 metropolitan daily newspapers • approximately 5 neighborhood/suburban, local weekly papers • 1 national newspaper • at least 750 national weekly and monthly magazines 	<ul style="list-style-type: none"> • 2 metropolitan daily newspapers • at least 20 neighborhood/suburban, local weekly newspapers • at least 20 national and international newspapers • Internet – thousands of Web sites and online editions of newspapers • approximately 4,500 national weekly and monthly magazines • at least 18 local monthly magazines
<u>INTER- PERSONAL COMMUNI- CATION:</u>	<ul style="list-style-type: none"> • face-to-face contact • mail • home phone 	<ul style="list-style-type: none"> • face-to-face contact • mail • home phone • cell phone • Internet – email, instant messages, chat rooms • FAX

Broadcasting: As the Commission recognizes, today's American consumers are served by more than 26,000 broadcasters across the United States.³⁷ These over-the-air outlets include 1,333 commercial television stations, 381 non-commercial educational television stations, 568

³⁶ Burlington, Vermont/Plattsburgh, New York is the 91st largest Nielsen DMA and the 141st largest Arbitron market. See Exhibit 2 for sources.

³⁷ See *Broadcast Station Totals as of September 30, 2002*, Public Notice (November 6, 2002); *Broadcast Station Totals as of September 30, 1999*, Public Notice (November 22, 1999).

Class A television stations, and 2,127 other low power television stations serving 107 million television households. Even in the last few years, the number of broadcast stations has continued to climb: as of September 30, 2002, there were 26,234 broadcast stations in the United States, up 7% from just three years ago.³⁸ There are now at least nine national television programming networks accessible to today's consumers, and as of 1996, the average American television household had access to 13.1 over-the-air television stations.³⁹

In addition, consumers across the country have access to nearly 10,000 commercial radio stations and more than 2,300 non-commercial educational radio stations. This proliferation of outlets has led to the emergence of a whole new breed of program formats – including "all news" and "talk" stations – which disseminate a diverse range of ideas from all across the ideological spectrum.⁴⁰ Moreover, the creation and licensing of new low-power services within the traditional broadcast media have allowed viewpoint diversity to flourish, as many of these

³⁸ See *id.*

³⁹ See Jonathan Levy, Marcelino Ford-Livene and Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, September 2002 ("Study #12"), at 18. The study indicates that 1996 is the last year for which this information was compiled. In addition, digital technologies such as digital television have the potential to substantially further increase the broadcasting options available to consumers. *Id.* at 76. The study notes that, by giving broadcasters the ability to multicast, DTV technologies have the potential to "radically change" the "range of services delivered to viewers." *Id.* In fact, PBS already distributes a four-channel multicast network feed to its digital public television affiliates, allowing viewers with digital televisions to receive simultaneously PBS' regular programming and movies from the PBS library, children's programming and a home improvement channel. See Karen Brown, *Cable, Broadcast Face Digital Disconnect*, Multichannel News (December 9, 2002).

⁴⁰ See, e.g., NPR: Talk of the Nation, *Analysis: Art of the Talk Show*, 2001 WL 4190093 (broadcast Aug. 29, 2001) (discussing the phenomenon of talk radio in America and noting that the top three radio talk show hosts – Rush Limbaugh, Dr. Laura Schlessinger, and Howard Stern – garner 15 million, 14 million and 8.5 million weekly listeners respectively). See also The Pew Research Center, *The Tough Job Of Communicating with Voters* (Feb. 5, 2000) (finding that 15 percent of Americans regularly learned about the 2000 presidential campaign from talk radio and 29 percent sometimes learn about the campaign from talk radio).

stations' "niche" programs cater to residents of specific ethnic, racial, or special interest communities.⁴¹

Cable and DBS: Cable and DBS have created a dynamic new way for Americans to use their televisions, together providing more than 87 million households with a panoply of channels unimaginable 40 years ago.⁴² More than 230 national programming networks compete for viewers' attention, with an additional 50 regional networks also serving customers in different parts of the country.⁴³ The Commission has indicated that cable service is available in as many as 97% of American homes and that, as of June 2002, 69 million American households subscribed.⁴⁴ As the Commission has recognized, cable penetration rates are "quite high" in a broad range of income brackets.⁴⁵ According to a 2002 survey, for example, the cable penetration rate is approximately 60 percent for television households with annual incomes under \$25,000 and is 68 percent for households with incomes between \$25,000 and \$50,000.⁴⁶

⁴¹ See, e.g., *In the Matter of Review of the Commission's Rules Governing the Low Power Television Service*, 9 FCC Rcd 2555 (1994); *Creation of Low Power Radio Service*, 15 FCC Rcd 2205 (2000) (FCC creating a new class of radio stations designed to serve localized communities or under-represented groups/viewpoints within communities); *In Re Establishment of a Class A Television Service*, 16 FCC Rcd 6355 (2000) (FCC establishing a service to allow low-power television stations, which provide important "niche" programming, to obtain "primary" status and thus be accorded protection from interference).

⁴² See *Video Competition Report*, at Appendix B.

⁴³ Notice at ¶ 25.

⁴⁴ See *Video Competition Report*, at ¶ 19, Table 1 and Appendix B. The cable availability percentage has been subject to some question. The number of homes passed by cable as of June 2002 was estimated to be 103 million. The number of U.S. TV Households was reported as 105.4 million. A question has been raised as to whether the number of homes passed should be compared to the number of TV Households, all households, all occupied housing units, or all housing units in the United States. If the number of homes passed is compared to the total number of all housing units, the estimate of cable availability could be as low as 78%.

⁴⁵ See *Review of the Prime Time Access Rule, Section 73.685(k) of the Commission's Rules*, 11 FCC Rcd 546, 585 (1995).

⁴⁶ See Mediamark Research Inc., 2002 Doublebase Data, provided by the Cable Television Advertising Bureau. By comparison, the survey determined that the national cable penetration rate is 65 percent. *Id.*

Moreover, cable penetration rates continue to grow among minority populations. Over 75 percent of African-American households now subscribe to cable, compared to 65 percent in 1997. Similarly, 62 percent of Hispanic households currently subscribe, compared to 57 percent five years ago.⁴⁷

DBS also has been witness to remarkably rapid growth – an average of nearly 30% in each of the last five years – to more than 18 million subscribers.⁴⁸ In addition, a variety of entities provide terrestrial wireless cable service to an additional 2.8 million households.⁴⁹ Overall, 89 million American households, representing nearly 90 percent of the country's television households, subscribe to at least one type of multichannel video program distributor.⁵⁰

Together, the surging growth of these services has had a profound impact on the viewing options available to the American television audience. Around-the-clock news channels, such as CNN, MSNBC, Fox News, C-SPAN, and C-SPAN II, provide worldwide news coverage at any time of day or night. Additional news channels, such as CNBC, Court TV, Bloomberg Television, ESPN, and the Weather Channel, are devoted to specific categories of news and information, ranging from financial news to sports and weather. Increased cable penetration also has resulted in the emergence of regional cable news networks that provide news and information targeted to the local community served by a particular cable system. In addition, local franchising authorities often require cable systems to set aside public, educational and government ("PEG") channels that provide additional local news and information, such as

⁴⁷ See Cable Television Advertising Bureau, *Cable Penetration Continues to Grow in Multicultural Households* at <<http://www.cabletvadbureau.com/02PressReleases/020225.htm>> (visited January 2, 2003).

⁴⁸ See *Video Competition Report*, at Appendix B.

⁴⁹ *Id.*

⁵⁰ *Id.*

coverage of local town council meetings.⁵¹ Indeed, with the capacity to provide dozens – and in many cases more than 100 – channels, cable and DBS systems offer consumers an impressive array of specialized programming to cater to every taste and interest.⁵² From *The History Channel* to *The Food Channel* to *The Travel Channel*, cable and DBS subscribers can turn to any number of programming options for information and entertainment. Subscribers also can access content through emerging video-on-demand technologies and personal video recorders, or PVRs.

The Commission also recently authorized the Digital Audio Radio Service ("DARS"), which offers subscription radio service via satellite throughout the United States. Already, more than 140,000 consumers have signed up to receive about 100 channels of digital audio programming from one of the two new companies that launched service in the last two years.⁵³

Print Media: The print media landscape also has evolved dramatically in the last 40 years. Although daily newspaper circulation has remained steady or declined slightly in recent years, weekly newspaper circulation has increased nearly threefold since 1975 – from a circulation of approximately 35.9 million to a circulation of approximately 81.6 million in 1996.⁵⁴ And there were still 1,468 daily newspapers in 2001, with a combined circulation of

⁵¹ *Id.* at ¶ 150.

⁵² The Commission found that two-thirds of cable systems have facilities that provide at least 750 MHz of bandwidth. On average, cable systems provide 83 video programming channels. *See Video Competition Report*, at ¶¶ 22-23, Table 3. DBS operators typically provide more than 300 channels. *See Dinah Zeiger, Satellite Launches EchoStar Toward 300 Channels*, *Denver Business Journal*, at A12 (September 19, 1997).

⁵³ *Notice* at ¶ 26 & n. 86. In 1997, the Commission authorized XM Satellite Radio Holdings, Inc. ("XM") and Sirius Satellite Radio Inc. ("Sirius") to operate national satellite radio systems for reception by vehicle, home and portable radios. Through their high-power satellites, XM and Sirius offer 101 and 100 channels, respectively, of subscription-based music, news, talk, sports and children's programming. XM launched commercial service on September 25, 2001; Sirius launched its service on February 14, 2002. XM service costs \$9.95 per month, while Sirius charges \$12.95 per month. *See* <www.xmradio.com> and <www.sirius.com> (visited January 2, 2003).

⁵⁴ *See NBCO Proceeding NPRM*, at ¶ 10.

about 56 million.⁵⁵ The nation's nearly 8,000 weekly newspapers often serve to supplement or even enhance the local news coverage provided by daily newspapers throughout the country.⁵⁶ Weeklies tend to concentrate on local sports, school issues, zoning and property tax changes – news of keen local interest that is often too narrow for television and broad-based daily newspapers. Thus, weekly papers have emerged to fill a market niche by serving as sources of uniquely local information.

Consumers also have easy access to a broad range of magazines, including such general interest options as *Newsweek* and *Ladies Home Journal*. At the same time, specialty publications disseminate information on hundreds of niche interests, ranging from general business concerns (e.g., *Business Week*, *Forbes*, *Barron's*), to numerous specific professions (e.g., *AMA Journal*, *ComputerWorld*, *The New Social Worker*), to a remarkable array of hobbies and personal interests (e.g., *Wine Spectator*, *Bon Appetit*, *Nature*, *Bicycling*, *Runners World*). A Web site such as *Amazon.com*, moreover, offers consumers access to more than 50,000 periodicals, in addition to over one million books on practically every conceivable subject.⁵⁷

Both newspapers and magazines offer Americans low cost, portable and timely access to news and information. They also provide the kind of in-depth analysis and context often unavailable through other types of media. Moreover, consumers can turn to print media at any time their schedules permit. Significantly, newspapers are heavily supported by advertising and are generally available for well under a dollar per edition. Similarly, most consumer magazines

⁵⁵ Notice at ¶ 27.

⁵⁶ See *NBCO Proceeding NPRM*, at ¶ 10.

⁵⁷ See *Amazon Book Store* at <www.virtualfreesites.com/amazonbooks.html> (visited Nov. 25, 2002).

(also heavily supported by advertising) range in price from \$1.00 to \$5.00 per issue and enjoy a high "pass-along" rate that effectively cuts their cost on a per-reader basis.⁵⁸

Internet: The Internet has exploded onto the media landscape with a stunning impact on the way Americans obtain news, information and entertainment content. Unheard of among consumers as recently as 10 years ago, today the Internet has hundreds of millions of Web sites providing access to a virtually infinite array of content options.⁵⁹ Nielsen/NetRatings reported that nearly 170 million Americans currently have access to the Internet at home⁶⁰ and, as the *Notice* indicates, almost 60 percent of American homes now have Internet access.⁶¹ In addition, 66 percent of Americans had access to the Internet in the workplace as of August 2001.⁶² Those without access at home or work often have free access at schools or local public libraries, or enjoy low-cost access at Internet cafes. The Commission's E-Rate program, for instance, already has committed more than \$3.65 billion to wire schools and public libraries across the country with modern telecommunications networks.⁶³

The number of people that reported *using* the Internet to obtain news and information in an average week more than doubled between 1997 and 2000 – to 34 percent – while 49 percent

⁵⁸ See Thomas C. Quinn, Chris T. Allen & Richard J. Semenik, *Advertising and Integrated Brand Promotion*, at 537 (3rd Ed., Thomson-Southwestern Publishing 2003).

⁵⁹ The Internet Software Consortium reported that, as of July 2002, there were 162,128,493 Web sites (as measured by a survey of Internet domains). See Internet Domain Survey, July 2002, <<http://www.isc.org/ds/WWW-200207/index.html>> (visited Dec. 8, 2002).

⁶⁰ See Average Web Usage, Month of October 2002, U.S., <<http://pm.netratings.com/nnpm/owa/Nrpublicreports.usagemonthly>> (visited Dec. 4, 2002).

⁶¹ *Notice* at ¶ 28.

⁶² See CyberAtlas, *Number of American Workers Online Increases*, Aug. 23, 2002, at <http://cyberatlas.internet.com/big_picture/geographics/article/0,,5911_872091,00.html> (visited December 30, 2002).

⁶³ See *E-Rate: A Success Story*, Remarks of FCC Chairman William E. Kennard to the Educational Technology Leadership Conference, January 14, 2000 (as prepared for delivery), at <<http://www.fcc.gov/Speeches/Kennard/2000/spwek002.html>> (visited December 30, 2002).

of Americans in 2000 reported using the Internet in an average week "for any purpose."⁶⁴ A 2001 Roper study (the "*Roper Study*") also confirmed that "growing numbers of Americans are clicking the 'word-of-mouse' option of the World Wide Web."⁶⁵ The statistics bear this out, as more American adults in a 2002 study reported that they used the Internet in the previous 30 days (53.1 percent) than read a daily newspaper (49.3 percent).⁶⁶

Most importantly, the cost of access to the Internet is now within reach to nearly all Americans. Even since the initiation of this proceeding, prices for Internet-ready computers have dropped to levels approaching the cost of a television set and dial-up Internet access is widely available for less than \$10 per month.⁶⁷

Among the Internet's greatest strengths is its around-the-clock accessibility. With the Internet, consumers have instantaneous access to information, including breaking news that is often available in real time. With so many Web sites and content options, the Internet caters to an effectively limitless range of specialized interests. Moreover, consumers can find equal access to both local content and information from across the world. While traditional media outlets, such as newspapers and broadcasters, have launched Web sites and established a presence on the Web, the low cost and ease of entry has allowed countless newcomers to express an immeasurable number of ideas and to widely distribute information to a worldwide audience.

⁶⁴ See *Leveraging Newspaper Assets: A Study of Changing American Media Usage Habits*, Commissioned by the Newspaper Association of America (2000), at 27.

⁶⁵ See *Usage and Behavior on the Internet*, Roper ASW (2001), at "More Americans Turning To Internet".

⁶⁶ See Mediamark Research Inc., 2002 Doublebase Data.

⁶⁷ See, e.g., Advertisement, BestBuy.com, at <<http://www.bestbuy.com/ComputersPeripherals/Desktops>> (visited January 2, 2003) (offering complete desktop computer system from \$399); Press Release, *Bluelight.com and Kmart Thank Loyal Shoppers with Free Bluelight Unlimited Internet Access Offer*, at <<http://www.kmartcorp.com/corp/story/pressrelease/news/pr020530.stm>> (visited January 2, 2003) (citing Bluelight.com's \$8.95/monthly price for unlimited Internet access).

The Internet also serves as the ultimate aggregator. It has the capacity to bring together in a single outlet a number of separate sources of information and ideas. *Yahoo!*, for instance, provides links to the Web sites of more than 9,500 newspapers, 6,800 television stations and nearly 10,000 radio stations worldwide.⁶⁸ Similarly, *Google* recently launched a news service that presents information culled from approximately 4,000 English-language news sources worldwide, automatically arranged to present the most relevant news first.⁶⁹ The Internet also hosts chat rooms, listservs, electronic bulletin boards and other e-mail discussion fora, each of which provides additional, interactive sources of information.

The Internet also is becoming increasingly portable. Consumers today can access Internet content from just about anywhere, using cell phones and handheld computers and through wireless computer networks. Wireless access is not just more convenient; it also may be playing a key role in expanding the Internet's accessibility. The *Washington Post* recently examined the way "WiFi" technology has enhanced the lives of homebound senior citizens in Maryland by allowing them to travel "virtually" anywhere via the Internet, even though they no longer can physically visit new places.⁷⁰ With the advent of broadband methods of accessing the Internet, consumers are now finding it possible to enjoy quality streaming video and audio on the Web, innovations that will only enhance the Internet's utility as a source for information, news and entertainment. In fact, Internet streaming has made it possible for the first time for Americans to deliver their own video or audio content to a mass audience without a broadcast license or cable channel.

⁶⁸ See *Yahoo! Directory, News and Media* at <dir.yahoo.com/News_and_Media> (visited November 20, 2002).

⁶⁹ See *Google Launches News Compilation Site*, The San Diego Union-Tribune, at E4 (September 30, 2002).

⁷⁰ See Yuki Noguchi, *Homebound But Plugged In*, The Washington Post, at E1 (November 27, 2002).

The Internet has had a tremendous impact on expanding accessibility to the wealth of information that comprises the marketplace of ideas.⁷¹ It would be difficult to overestimate the role the Internet plays in consumers' viewpoint formation in the modern media marketplace. As the Supreme Court has recognized, "[w]hile 'surfing' the World Wide Web, the primary method of remote information retrieval on the Internet today, . . . individuals can access material about topics ranging from aardvarks to Zoroastrianism. One can use the Web to read thousands of newspapers published around the globe, purchase tickets for a matinee at the neighborhood movie theatre, or follow the progress of any Major League Baseball team on a pitch-by-pitch basis."⁷²

Just last month, for instance, the Internet played a crucial role in the downfall of the majority leader of the United States Senate by disseminating the story surrounding Senator Trent Lott's recent controversial remarks at Strom Thurmond's 100th birthday party. While most of the mainstream press failed to pick up on the story initially, "[W]eb writers were leading the charge" in a way that "helped force the story into public view."⁷³ The litany of Internet reports from a variety of independent sources, including a law professor's "InstaPundit" column, must be credited with giving the story widespread coverage.⁷⁴

⁷¹ Moreover, the Internet has spurred an increase in the rapid rate of growth in the number of media outlets serving both large and small markets since the passage of the 1996 Act. A study performed by Professor David Pritchard and submitted to the Commission in March 2002 demonstrates that, even in a small market such as Lisbon, South Dakota, "the number of outlets available to the residents of Lisbon grew six times faster after the passage of the 1996 Act than in the period immediately preceding it." See David Pritchard, *The Expansion of Diversity: A Longitudinal Study of Local Media Outlets in Five American Communities*, at 13, submitted with the Comments of Viacom, in MM Docket 01-317, filed March 27, 2002. Professor Pritchard credited the proliferation of Internet sites with localized content as a key driver of this rapidly increasing growth. *Id.*

⁷² *Ashcroft v. ACLU*, 122 S. Ct. 1700, 1703 (2002).

⁷³ See Howard Kurtz, *A Hundred-Candle Story and How to Blow It*, The Washington Post, at C-1 (December 16, 2002).

⁷⁴ See *id.*

Similarly, in the late 1990s, Internet reporter Matt Drudge broke the story of the so-called "Monica Lewinsky" scandal on his Web site, ultimately leading to the impeachment of President Bill Clinton.⁷⁵ As one observer noted in connection with Drudge's scoop of the story, "[w]e have entered a new media reality, one in which lone-wolf cyber-columnists like Matt Drudge have the ability to explode a major story onto the nation's front pages. Traditional news organizations no longer have the exclusive province to decide what information enters the public arena."⁷⁶ The Lott and Drudge cases are illustrative of a phenomenon in which lesser-known media use the Internet to spur new subjects into the widely-accessible marketplace of ideas. Once they are published on an Internet site, thereby entering public discourse, even controversial stories such as Drudge's often wind up on the front pages of major newspapers and as the lead stories on network television news.

Interpersonal Communications: The vital role of interpersonal relationships and communications in Americans' viewpoint formation should not be ignored. As the *Roper Study* emphasized, "word-of-mouth insights from friends and family are still the leading source for most day-to-day consumer decisions from where to invest to how different makes of cars stack up and what restaurants to try."⁷⁷ The *Roper Study* asked Americans what sources they used to obtain information on various issues, from consumer products to entertainment options to financial planning. The study found that in 11 of 18 categories, Americans reported friends or family as the sources they most often turned to for information. Moreover, the Brigham Young University Center for the Study of Elections and Democracy recently released a study

⁷⁵ Drudge has had more than 1 billion visits to his Web site in the past year. See *Visits to Drudge*, at <<http://www.drudgereport.com>> (visited December 31, 2002).

⁷⁶ See J.D. Lasica, *The Media's Matt Drudge Syndrome*, *The American Journalism Review*, April, 1998.

⁷⁷ See *Roper Study*, at "More Americans Turning To Internet".

documenting how voters react in a highly-charged campaign environment.⁷⁸ The results reinforce the essential role interpersonal communications plays in viewpoint formation. Between two-thirds and three-quarters of respondents told researchers that they stopped paying attention when confronted with a barrage of political communication.⁷⁹ Instead, "[w]hen faced with daunting volumes of political communication, voters turned to trusted sources of information such as family and friends, groups they affiliate with" to shape their voting decisions.⁸⁰ Indeed, studies in this area have long concluded that "personal influence [is] both more frequent and more effective than any of the mass media, not only in politics but also in marketing, fashion decisions, and movie attendance."⁸¹ Thus, people do not simply adopt wholesale the messages they may see or hear from the mass media but rather are greatly influenced by the input they receive from other people in their immediate circles, such as family, friends and colleagues at work. The Internet has also affected this critical aspect of viewpoint formation: chat rooms and news groups expand the range and number of persons with whom a consumer can interact.

Multitasking in an Interchangeable Media Marketplace: American consumers alternate between differing and multiple media outlets with ease. The decisions they make regarding

⁷⁸ See David Magleby and J. Quin Monson, *Campaign 2002: The Perfect Storm*, <<http://cid.byu.edu/magleby/docs/csedreport.pdf>> (visited Dec. 8, 2002) ("BYU Study").

⁷⁹ See *id.* at 9-10

⁸⁰ *Id.* at 1.

⁸¹ The preeminent study in this field analyzed the affect of media messages on Erie County, Ohio voters in the 1940 presidential election. The Erie County study ultimately concluded that "opinion leaders" (e.g., family members, friends, neighbors and others in the community whom voters admired or wished to emulate) had a significant impact on how people received and responded to media messages. See Werner J. Severin & James W. Tankard Jr., *Communication Theories: Origins, Methods, and Uses in the Mass Media* (Addison, Wesley, Longman Inc.) 2001, at 204. See also Shearon A. Lowery & Melvin L. DeFleur, *Milestones in Mass Communication Research* (Media Effects 3rd Edition) (Longman Publishers) 1995, at 400. Over the ensuing decades, continuing research by social scientists has validated and refined these findings. Later research determined, for example, that "opinion sharing" among people who perceive themselves as equals is likely to be an influential force in viewpoint formation. See *Communications Theories*, at 189-211.

where to turn for news, information and entertainment are products of the vast number of media choices as well as their ubiquity and accessibility. The fundamental characteristic of modern media consumers is the freedom with which they switch seamlessly between media. Whether a consumer picks up a magazine, turns on the radio, reads a newspaper or visits the Internet depends to a large extent on such mundane factors as an individual's location, the time of day or the day of the week. Yet no particular media outlet maintains an exclusive hold on Americans' attention. To the contrary, Americans today constantly jump between sources of content, and often utilize multiple sources at the same time. In fact, it is not uncommon for consumers to surf the Internet while watching the television or listening to the radio – sometimes with the goal of finding additional information about a particular subject, but often simply because they enjoy the freedom to multitask.

That today's media consumers are agile and opportunistic is confirmed by Study #8 and the *Roper Study*. Each of these analyses demonstrates that consumers are adept both at using various sources to obtain information and at using multiple sources simultaneously. Study #8 found that more than 84 percent of Americans had used television to obtain local news in the previous week, while 62 percent used newspapers, 35 percent used radio and 18 percent used the Internet.⁸² As the study indicates, the total *substantially* exceeds 100 percent because many consumers used more than one of these sources.⁸³ The study found similar results for national news.⁸⁴ Even within these categories, Study #8 found that Americans divided their time among content providers, including different television and cable networks, a variety of radio stations

⁸² See Study #8 at Table 001.

⁸³ See *id.*

⁸⁴ See *id.* at Table 009.

and a multitude of Web sites.⁸⁵ The *Roper Study* likewise determined that Americans easily switch between the multiple sources of content available. The study found that at least 20 percent of consumers reported using ten different types of media to obtain news and information.⁸⁶ Indeed, from the standpoint of an individual consumer, the "most important" medium is the one – or even many – that he or she *chooses* to access at a given point in time.

In sum, Americans today have access to an incredibly vast universe of media options. Compared to Americans 60 years ago, today's media consumers can and do turn to a significant number of additional outlets for news, information and entertainment. Whether as a result of dramatic increases in the number of traditional outlets, such as broadcast stations, or entirely new technologies, such as DBS and the Internet, Americans are inundated with more choices than their predecessors possibly could have imagined. This plethora of options is available to consumers all across the United States, regardless of their race, ethnicity or gender; regardless of their location; and regardless of their socio-economic status. The last 60 years – indeed, even the last 6 to 7 years, with the advent of the Internet – have produced a revolution in media accessibility resulting in essentially ubiquitous media availability for all Americans.

3. In Today's Media Marketplace, All of the Commission's Policy Goals Are Realized Through Reliance on the Merger Guidelines

In light of these vast changes in the media landscape, the Commission properly recognizes in the *Notice* that virtually all of the fundamental assumptions underlying its current media ownership regulations need to be reevaluated.⁸⁷ In fact, Media Bureau Chief W. Kenneth Ferree has described the instant proceeding as "a process of almost Copernican scope" because it

⁸⁵ *Id.* at Tables 010-020.

⁸⁶ *See Roper Study*, at "Technology Means Flexibility".

⁸⁷ *See, e.g., Notice* at ¶ 29.

"challenges an axiom upon which our media ownership rules and policies have been founded for generations: that broadcast television and radio are the center of the media universe."⁸⁸ In order to assist the Commission and the public in this daunting undertaking, the Joint Commenters asked economist Dr. Bruce Owen – who has lectured, testified and written extensively on media ownership issues – to analyze the current state of the media marketplace and determine what kinds of regulations would best serve the Commission's "touchstone" policy goal: viewpoint diversity.

As demonstrated in Dr. Owen's statement, proper application of antitrust and competition laws is sufficient to maintain adequate diversity in the "marketplace of ideas" – the phrase Dr. Owen uses to describe a robust media marketplace where diverse viewpoints abound.⁸⁹ The concept of the "marketplace of ideas" is distinguishable from that of an "economic market," a phrase Dr. Owen uses to refer to "ordinary commercial markets for the sale of advertising, the purchase of programming, and (in the cases of multichannel video program distributors, certain Internet service providers, and print media) the compilation of content packages and the provision of transmission services for sale to customers."⁹⁰

Dr. Owen demonstrates that the analytical approach of the 1992 Horizontal Merger Guidelines ("Merger Guidelines") used by the Department of Justice and the Federal Trade Commission should form the basis of the Commission's analysis of its media ownership regulations. As Dr. Owen notes, "[t]he three key questions facing the Commission with respect

⁸⁸ See TVTechnology.com, *FCC Undertakes Historic Overhaul of Ownership Rules*, September 12, 2002 at <<http://www.tvtechnology.com>> (visited December 8, 2002).

⁸⁹ The concept of the marketplace of ideas has long been a central theme in American history: Thomas Jefferson advocated it in his first inaugural address, and Justice Holmes did so as well in *Abrams v. United States*. See 250 U.S. 616 (1919) (dissenting opinion); see also *Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n*, 447 U.S. 557, 597 (1980).

⁹⁰ See Exhibit 3, *Statement on Media Ownership Rules*, Bruce M. Owen, at 1-2 ("Owen Statement").

to [economic] markets are: Which sellers offer choices that customers find attractive? Are there enough such sellers to provide effective competition? Are there significant barriers to entry?"⁹¹ And, more importantly, Dr. Owen indicates that these are "the same issues addressed in the Merger Guidelines."⁹² Dr. Owen also explains that the determination of relevant markets cannot be prejudged in today's complex and ever-changing media environment by establishing arbitrary categories based on technologies or historical regulatory distinctions. Yet, the Commission's current ownership rules "are based entirely on technology and other such *a priori* distinctions [which] . . . lack any conceptual or empirical link to consumer harm from ownership concentration."⁹³

According to Dr. Owen, "as a practical matter, enforcement of the Clayton Act in media economic markets will serve to prevent undue concentration in markets for ideas and information"⁹⁴ because (i) markets for ideas are much broader than corresponding economic markets, (ii) relevant markets for ideas are less concentrated than narrowly-defined economic markets because of the way shares are measured, and (iii) the barriers to entry into the marketplace of ideas are exceedingly low (*e.g.*, Matt Drudge). Given that antitrust and competition laws are enforced on markets that are narrower, more concentrated, and in which the barriers to entry are much higher than in the marketplace of ideas, proper application of these antitrust and competition laws ensures that media consolidation will be stopped long before it poses a threat to competition in the marketplace of ideas. Stated differently, properly enforced

⁹¹ *Id.* at 2.

⁹² *Id.*

⁹³ *Id.* at 3.

⁹⁴ *Id.* at 2.

competition laws are sufficient to ensure viewpoint diversity and will otherwise serve the Commission's policy goals.

4. Because a Multiple Owner Has an Incentive to Present Diverse Viewpoints, the Commission's Use of Outlet Diversity as a Proxy for Viewpoint Diversity Is in Fact Counterproductive

While Dr. Owen's analysis demonstrates that reliance on competition laws will lead to an abundance of outlets, the Commission recognizes in the *Notice* that its emphasis on outlet diversity may be counterproductive.⁹⁵ Thus, the Commission questions the continuing viability of the premise that each media owner speaks with a single, monolithic voice. There is in fact ample evidence to suggest that the marketplace of ideas is even more robust than is indicated by an analysis of outlet diversity.

In this regard, Study #2, which assesses the editorial positions taken by commonly owned newspapers and television stations, demonstrates that media ownership does not correlate with a uniform position on important political issues.⁹⁶ The study evaluates the "slant" of news and commentary regarding the 2000 presidential campaign disseminated by ten newspaper/broadcast combinations during the final fifteen days of the campaign. The analysis revealed that, in five of the ten combinations studied, the overall slant of the coverage provided by the television station was meaningfully different from that offered by the newspaper. In the remaining five combinations, the overall slant of newspaper and broadcast coverage were not significantly

⁹⁵ See *Notice* at ¶ 82.

⁹⁶ See David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign*, (September 2002) ("Study #2).

different.⁹⁷ The data further showed that the slant of both the newspaper and station coverage often were inconsistent with the newspaper's official candidate endorsement.⁹⁸

The author of Study #2 determines that the data strongly suggest that "common ownership . . . does not result in a predictable pattern of news coverage and commentary about important events" ⁹⁹ The study also concludes that there is no evidence that combination owners generally control the presentation of news and finds that "[d]ifferent news organizations owned by the same company tended to do things differently" and that newspaper "editorial pages carried not only management's opinion but also many other opinions" ¹⁰⁰ By illustrating that jointly owned newspapers and television stations are equally likely to present the same, or a different, generalized "slant" on important news issues, the study strongly supports the view that there is no basis for the FCC to be concerned either that combinations coordinate their presentation of news or public affairs or that corporate owners habitually dictate the viewpoints expressed over their platforms.

These findings comport with prior FCC acknowledgments that common ownership within a local market tends to increase an owner's market-based incentives to diversify the

⁹⁷ See *id.* at 8, Table 2.

⁹⁸ Indeed, in only one of the combinations studied was the station's overall slant definitively consistent with the newspaper's endorsement (*Newsday*/WPIX, New York), and two of the stations presented news with a slant that clearly contradicted the newspaper's endorsement (*Arizona Republic*/KPNX, Phoenix; *Courant*/WTIC, Hartford). In five additional cases, the newspaper specifically endorsed a candidate while the station remained neutral (*Post*/WNYW, New York; *Forum*/WDAY, Fargo; *Tribune*/WFLA, Tampa; *The Morning News*/WFAA, Dallas; and *Tribune*/WGN, Chicago). In the remaining two combinations, the newspaper did not endorse a candidate. Similarly, of the eight newspapers that endorsed candidates, only half had slants corresponding to the endorsement (*Post*, New York; *Tribune*, Tampa; *Newsday*, New York; and *The Morning News*, Dallas), while two had slants contradicting the endorsements (*Forum*, Fargo; *Courant*, Hartford), and two remained essentially neutral (*Arizona Republic*, Phoenix; *Tribune*, Chicago). See *id.* at Table 2.

⁹⁹ Study #2 at 11.

¹⁰⁰ *Id.*

material it disseminates. According to this well-recognized economic theory, in order to reach the largest possible aggregate audience, group owners have strong incentives to provide the widest feasible range of content options that will appeal to an extensive array of niche viewpoints and tastes, whereas an independently operating media outlet often has the motivation to engage in somewhat more "mainstream" content or "greatest common denominator" programming in order to attract the largest possible audience for that one outlet.¹⁰¹

The Commission has directly endorsed this proposition in prior proceedings addressing its media ownership rules. For example, in a 1991 radio ownership proceeding, the agency stated its belief that separately owned stations "will each tend to strive for the same core audience with roughly the same type of programming, while the same stations managed in common may have greater incentives to appeal separately to distinct segments of the audience with distinct programming."¹⁰² The Commission further explained that because stations managed in common are likely to "effectively counterprogram each other" in this manner, "increased group ownership ... may encourage [diversity of programming]. . . ."¹⁰³ Or, in the words of Chairman Powell, "[c]ommon ownership can lead to more diversity."¹⁰⁴

In a 1995 television ownership proceeding, the FCC similarly recognized that:

¹⁰¹ Support for this proposition is found in a wealth of economic studies. *See, e.g.*, Bruce M. Owen and Steven S. Wildman, *Video Economics* (Cambridge, Mass.: Harvard Univ. Press 1992), Chapters 3 and 4 (cited in *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, 15 FCC Rcd 11253, 11263, n.30 (2000)); Benjamin M. Compaine, *The Impact of Ownership on Content: Does It Matter?*, 13 Cardozo Arts and Ent. L.J., 755, 755-80 (1995); John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, 1 Journal of Media and Economics 63 (1988); Stanley M. Besen and Leland Johnson, *Regulation of Media Ownership by the Federal Communications Commission: An Assessment*, at 7, 28-32 (1984).

¹⁰² *Revision of Radio Rules and Policies*, 6 FCC Rcd 3275, 3276 (1991) ("1991 Radio Ownership Proceeding").

¹⁰³ *Id.*

¹⁰⁴ *See* Jim Rutenberg, *Few Media Owners, More Media Choices*, The New York Times, at C1 (December 2, 2002).

[W]here there are competing parties, each of their strategies would be to go after the median viewer with 'greatest common denominator' programming, leaving minority interests unmet. But where one party owned all the stations in a market, its strategy would likely be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests. . . . [T]his model may, indeed, promote diversity of entertainment formats and programs. . . .¹⁰⁵

As the FCC itself recognizes, the weight of the evidence suggests that owners of multiple platforms generally have stronger incentives than single-platform operators to greatly diversify their offerings. This data, in conjunction with the evidence showing that even individual platforms or programs offer audiences a wide range of perspectives, should allay any concern that prohibitions against media consolidation are needed to prevent common owners from saturating the marketplace with single, monolithic viewpoints.

Moreover, a quick scan of the program schedules for the broadcast and cable networks owned by Viacom, Fox and NBC demonstrates how their programming offerings are anything but monolithic. Fox offers everything from the biting satire of *The Simpsons* to the groundbreaking issues addressed in *Boston Public* to the sharp conservative commentary of the *O'Reilly Factor*; Viacom programs range from the faith-filled lives in *Touched By An Angel* to the dysfunctional family in *The Osbournes* to the smart educational content of *Blues Clues*; NBC broadcasts the sophisticated urban situation comedy *Friends*, the thought-provoking and insightful *West Wing*, and the compelling drama of *Law & Order*. Furthermore, many media offer contrasting perspectives within individual programs or over a single platform in direct response to consumer demand. For instance, a multitude of programs currently transmitted via

¹⁰⁵ *In Re Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules*, 10 FCC Rcd 3524, 3551 (1995) (internal citation omitted) ("*1995 TV Ownership Proceeding*"). See also *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2771-72 (1992) ("*Radio Rules and Policies Order*") ("[C]ommenters tend to agree . . . that greater combination will not harm diversity because, while competing stations might try to reach the same core audience, a single owner might try to program different stations to appeal to different audience segments in order to maximize its total audience size.").

cable, DBS and broadcast platforms are designed to feature hosts or guests with opposing viewpoints on specific issues. One such program is Fox News Channel's *Hannity & Colmes*, which pits conservative host Sean Hannity against liberal counterpart Alan Colmes.¹⁰⁶ Programs such as *The McLaughlin Group* take this model one step further through a round-table format that presents a wide spectrum of political perspectives, ensuring that each episode will feature a vigorous debate on current events.¹⁰⁷ A seemingly endless array of Internet sites fulfill a similar function, in a more comprehensive way, by offering links to numerous, often contrary sources of ideas and information. One of many examples is the *Yahoo!* news and media service, which offers links to over 400 columns and columnists, thus providing (from a single outlet) a tremendous spectrum of viewpoints and perspectives.¹⁰⁸

In short, competitive economic markets ensure sufficient outlet diversity to protect competition in the marketplace of ideas and, in practice, viewpoint diversity in competitive economic markets will be even greater than is suggested by an analysis of outlet diversity alone.

II. CONTINUED MEDIA-SPECIFIC OWNERSHIP REGULATION IS NOT ONLY UNNECESSARY TO SERVE ANY OF THE COMMISSION'S POLICY GOALS, IT OFTEN UNDERMINES THOSE GOALS

As the foregoing demonstrates, the dramatic growth of the media marketplace, subject to proper application of competition laws, ensures achievement of the Commission's diversity, competition and localism goals. The Commission need retain none of its media-specific ownership regulations, nor should the Commission pursue a case-by-case approach to ownership

¹⁰⁶ See *FOX News, The Hosts of Hannity & Colmes*, at <www.foxnews.com/story/0,2933,51867,00.html> (visited November 22, 2002). Likewise, Washington-area radio station WMAL presents its *Morning News* with the "right/left/center" trio of Jane Norris, Bill Press, and Andy Parks. See *The WMAL Morning News*, at <<http://www.wmal.com/showdj.asp?DJID=11479>> (visited November 22, 2002).

¹⁰⁷ See *The McLaughlin Group*, at <<http://www.mclaughlin.com>> (visited November 22, 2002).

¹⁰⁸ See *Yahoo! Directory, News and Media*, at <[dir.Yahoo.com/News_and_Media/Columns_and_Columnists/](http://dir.yahoo.com/News_and_Media/Columns_and_Columnists/)> (visited November 22, 2002).

regulation.¹⁰⁹ Examination of the existing media-specific rules in light of the robust competition that characterizes the modern media marketplace confirms that these rules do not further the Commission's goals, and may even undermine them.

A. The National TV Ownership Cap, Which Has No Relevance to Viewpoint Diversity, Harms Competition and Localism by Excluding Some of the Most Effective Competitors

Diversity – As the FCC correctly concludes in the *Notice*, "the national TV ownership cap is not directly relevant, and perhaps not relevant at all, to the goal of promoting viewpoint diversity," because "[c]onsumers generally do not travel to other cities to obtain viewpoints."¹¹⁰ Rather, "they rely on outlets for news sources . . . that are available in their own cities," so that "the expression of viewpoints by television stations in one city does not . . . affect in any meaningful way the viewpoints available to people located in other cities."¹¹¹ Thus, the FCC cannot – and the *Notice* does not – contend that the national TV ownership cap has any real impact on viewpoint diversity in a given local market.

To the contrary, the Commission itself has previously recognized that, even at the time of the rule's inception, the assumption that limiting national television ownership would promote local viewpoint diversity "was not based on hard evidence in the record."¹¹² Indeed, as the FCC has found, in a largely unbroken line of decisions between 1984 and 1995, this rule is irrelevant

¹⁰⁹ See *Notice* at ¶ 106.

¹¹⁰ *Notice* at ¶ 136.

¹¹¹ *Notice* at ¶ 136.

¹¹² See *In Re Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17, 24 (1984).

from the standpoint of an individual news consumer.¹¹³ It was the agency's abrupt departure in 1998 from this well-reasoned precedent that led the D.C. Circuit in *Fox* to remand the rule for further consideration by the Commission.¹¹⁴ Under the marketplace conditions that prevail today, it is even clearer now than it was at the time of the Commission's earlier decisions that a national cap is not necessary to promote viewpoint diversity locally.¹¹⁵

Localism – The *Notice* posits that the national ownership rule may have its most direct impact, if any, on the attainment of localism and observes that its "evaluation of the continued need for this rule will rely heavily on our findings regarding its effectiveness in promoting localism."¹¹⁶ In fact, Study #7 concludes that network owned-and-operated stations ("O&Os") outperform affiliates with respect to local news programming, suggesting that the rule is not only unnecessary to promote localism, but may be counterproductive in that it bars superior performers from station ownership.¹¹⁷

The National Association of Broadcasters and the Network Affiliated Stations Alliance (together, "NAB/NASA") recently submitted a study challenging the results set forth in Study

¹¹³ See *id.* at 20 ("[W]hereas the Rule imposes a national ownership limit, we believe that the more correct focus for addressing viewpoint diversity and economic competition concerns is the number and variety of information and advertising outlets in local markets, a matter that is not addressed by a nationwide restriction on ownership."); *1995 TV Ownership Proceeding*, 10 FCC Rcd at 3565 ("Television and competing outlets are viewed locally, and we question whether an increase in concentration nationally affects diversity on the local level.").

¹¹⁴ See *Fox*, 280 F.3d at 1044-45.

¹¹⁵ See also *infra* Section II.B. Of course, both local and non-local sources provide information about issues and concerns that may have national, international, regional and local dimensions – because in the real world, issues that people care about do not break neatly into geographic market segments. In any event, when imposing this market structure on the real world, it should be beyond dispute that there is more than sufficient diversity of media platforms and owners at the national level.

¹¹⁶ See *Notice* at ¶ 147.

¹¹⁷ See Thomas C. Spavins, Loretta Denison, Scott Roberts, and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs* (September 2002) ("Study #7").

#7.¹¹⁸ The NAB/NASA Submission criticizes Study #7 on methodological grounds – namely that Study #7 fails to account for the impact of market size – and reports its own independent regression analysis. The NAB/NASA Submission purports to demonstrate that affiliates and O&O stations offer about the same number of minutes of local news and public affairs programming, but that affiliates earn more awards for news quality than O&O stations.¹¹⁹

The Joint Commenters responded to the NAB/NASA Submission on December 19, 2002, and demonstrated that the submission has a serious analytical flaw that completely undermines its validity – exclusion of the news programming data for Fox O&Os and affiliates.¹²⁰ As shown in the Joint Response and in *EI Economic Study H*, EI finds that NAB/NASA's asserted justification for excluding Fox is "*absurd*."¹²¹ When the Fox stations are included, even NAB/NASA must concede that O&Os present significantly more minutes of news and public affairs programming than affiliates.¹²²

EI, using data different from Study #7, also undertook its own independent analysis of the amount of local news and public affairs programming presented by O&O stations and affiliates. Like the conclusion in Study #7, EI finds that O&O stations *carry significantly more minutes of* local news and public affairs programming than affiliates. Using the same simple regression

¹¹⁸ See *Early Submission of the National Association of Broadcasters and the Network Affiliated Stations Alliance*, filed December 9, 2002 ("NAB/NASA Submission").

¹¹⁹ See NAB/NASA Submission, at 2.

¹²⁰ See *Response of Fox, NBC/Telemundo, and Viacom to Early Submission of NAB and NASA*, filed December 19, 2002 ("Joint Response"). The Joint Commenters have retained Economists Incorporated ("EI") to conduct a series of economic studies regarding the Commission's ownership rules. See also *EI Economic Study H*, News and Public Affairs Programming: Television Broadcast Network Owned and Operated Stations Compared to Network Affiliated Stations.

¹²¹ See *EI Economic Study H*, at 3 (emphasis added); Joint Response, at 2. As EI explains, NAB/NASA has no justifiable basis for excluding the Fox stations from its regression. See *EI Economic Study H*, at 3.

¹²² See NAB/NASA Submission, at 6, n.6.

model presented in the NAB/NASA Submission, EI determined that O&Os carry approximately 30 percent more news and public affairs minutes per week than do affiliates.¹²³ Employing a richer set of explanatory variables, EI finds that O&Os carry 37 percent more news and public affairs minutes than affiliates.¹²⁴ In short, no matter what the approach – the Study #7 data adjusted for market size or the two regression analyses contained in *EI Economic Study H* – O&O stations broadcast significantly more news and public affairs than affiliates.

Similarly, with respect to awards, the NAB/NASA Submission omits relevant data and is therefore unreliable. In comparing the record of O&O and affiliate news operations, NAB/NASA complains that Study #7 should have accounted for the fact that stations in larger markets tend to win a disproportionate number of Alfred I. duPont-Columbia University ("duPont-Columbia") awards.¹²⁵ The NAB/NASA Submission breaks out selected data for those awards and contends that affiliates outperform O&Os in the top 10 markets.

EI conducted a similar analysis on a data set that NAB/NASA chose to ignore: the Radio and Television News Directors Association ("RTNDA") awards, another important source of data for Study #7. Because a larger number of RTNDA awards are given out each year, they likely offer a better measure of news quality than the duPont-Columbia awards. EI examines the RTNDA awards from two perspectives, first analyzing the awards bestowed in the top 10 markets and then broadening the scope to include the top 50 markets. In either setting, EI concludes, there is no discernible difference between O&Os and affiliates with respect to RTNDA awards.¹²⁶

¹²³ See *EI Economic Study H*, at 9.

¹²⁴ See *id.* at 10.

¹²⁵ NAB/NASA Submission at 7-8.

¹²⁶ *EI Economic Study H*, at 10-11.

In sum, NAB/NASA must concede that the data underlying Study #7, even when market size is taken into account, demonstrates that O&O stations present significantly more news and public affairs than do affiliates. Accordingly, in considering whether to eliminate the national multiple ownership cap, the Commission can confidently rely on the findings from EI's analyses set forth in *EI Economic Study H* – which are consistent with the data and findings of Study #7 – that O&O stations present significantly more news and public affairs than affiliates and that O&O stations earn at least as many awards as affiliates for news quality. The extent of the networks' news efforts are fully documented in the Joint Commenters' News Programming Exhibits attached hereto.

Ultimately, there remains an additional, fundamental reason why the national TV ownership rule does not serve the Commission's localism goal: the vast majority of television stations, including those owned by network affiliates, are not owned locally. Rather, affiliate stations generally are licensed to corporate group owners with headquarters in, at best, one of the markets in which the company also owns a station. Group owners such as Cox Broadcasting, Inc. (headquartered in Atlanta, GA), Gannett Broadcasting (headquartered in McLean, VA), Post-Newsweek Stations, Inc. (headquartered in Hartford, CT) and Hearst-Argyle Television, Inc. (headquartered in New York, NY), which between them own and operate scores of television stations across the country, are no more "local" to their non-headquartered markets than are the Joint Commenters. Rather, all group owners, including the Joint Commenters, put in place capable local managers who are attuned to the needs and interests of local viewers.

Finally, there is no reliable evidence that the national TV ownership cap fosters localism by preserving the bargaining power of independently owned affiliates vis-à-vis their network.¹²⁷

¹²⁷ See Notice at ¶ 152.

First, the FCC generally has abandoned the role of arbitrating commercial disputes or acting as guarantor of the *economic welfare* of individual businesses.¹²⁸ Second, the Commission specifically determined, when it opted to repeal the national TV ownership rule in 1984, that "[w]e do not believe that network ownership would result in stations refusing to transmit programming of intense local interest in order to clear a less desirable part of the network feed."¹²⁹

The evidence today bolsters the Commission's finding: independent affiliates' record of declining to clear network programming is substantially similar to that of O&Os, even though network affiliates have far more economic incentive to preempt programming. Specifically, the average affiliate preempted only 9.5 hours per year per station in 2001, while O&Os preempted an average of 6.8 hours per station – in each case less than one percent of prime-time programming.¹³⁰ O&Os, moreover, preempt more often than affiliates for both news and sports programming.¹³¹ In fact, as *EI Economic Study G* explains, any difference between affiliates and O&Os is largely due to higher preemption by affiliates for paid programming and telethons.¹³²

¹²⁸ The FCC long ago left the field of general economic oversight of stations. Since the repeal of the so-called "Carroll Doctrine," the Commission has not concerned itself with the economic welfare of any individual station, and the Commission lacks any reasonable basis for doing so now. *See Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958) (stating that the FCC could determine whether the economic effect of authorizing a new station in an area would damage or destroy service so as to be inconsistent with the public interest). After 30 years, the FCC repealed that doctrine, finding it to be no longer in the public interest. *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *clarified*, 4 FCC Rcd 2276 (1989). Even while the rule remained in effect, it was seldom applied, due to the difficulty of proving a link between new station entry and harm to existing stations.

¹²⁹ *See In Re Amendment of Section 73.3555*, 100 FCC 2d at 51.

¹³⁰ *See EI Economic Study G*, Preemption by O&Os Compared to Affiliates, at 1.

¹³¹ *See id.* at 3.

¹³² *See id.* at 2. No data has ever been provided to support the assumption that a preponderance of affiliate preemptions are related to the presentation of public interest programming, as opposed to being economically motivated. In a study of prime-time preemptions during the 1994-95 television season, CBS found that only 8.1 percent were attributable to local news and public affairs. Such preemptions were

Given that O&O and affiliate stations preempt network programming at similar rates, an increase in the number of network-owned stations will have no effect on the likelihood of preemption in a given market. Consequently, a station's switch from independent affiliate to network ownership will not affect the mix of local and network programming viewers receive, and thus will not impact local viewers' abilities to receive content suited to local needs.¹³³ Simply put, no evidence in the record justifies retention of any type of national ownership cap.

Moreover, with respect to network/affiliate relationships generally, the Commission in the 1990s determined that other rules meant to protect network affiliates were unnecessary and, in many cases, counterproductive – and so eliminated them. In 1995 the FCC repealed the prime time access rule ("PTAR"), which had effectively carved out an hour of evening air time on affiliated stations for non-network programming.¹³⁴ The rule was promulgated in 1971 to "reduce the networks' control over their affiliates' programming decisions" and to encourage the broadcast of locally-produced programs.¹³⁵ By the mid-1990s, the Commission phased out the rule because of the "substantially greater number of broadcast programming outlets" and the

dwarfed by those for syndicated programming, which amounted to 23 percent of the total. Telethons and paid political broadcasts accounted for an additional 7.2 and 2.5 percent, respectively. *See* Comments of CBS, Inc., in MM Docket No. 95-92, filed October 30, 1995, at 19. It is also important to note that in reality, an affiliate can almost always make more money by preempting an individual network program than by clearing it, because substituting other programming for network offerings allows the affiliate to sell all commercial availabilities for its own account, while receiving the benefit of "audience flows" from the network programming immediately preceding it.

¹³³ *See Notice* at ¶ 151. Indeed, there is nothing in the record to indicate that O&Os are any more reluctant than independent affiliates to interrupt regularly scheduled programming when actual breaking news events warrant.

¹³⁴ *See Review of the Prime Time Access Rule*, 11 FCC Rcd 546, 547 (1995) ("PTAR"). The PTAR prohibited network-affiliated television stations in the top 50 television markets from broadcasting more than three hours of network programs during the four prime time viewing hours. Also in the 1990s, the FCC eliminated the so-called "financial interest and syndication" ("fin-syn") rules, which were designed to encourage the networks themselves to select a more diverse array of program content than they might otherwise have done. The fin-syn rules – which were not directly pertinent to network-affiliate relationships – are discussed briefly *infra* Section II.B.

¹³⁵ *See PTAR* at 547.

changes in market conditions which "safeguard[] affiliate autonomy."¹³⁶ Having repealed a rule that directly addressed the supposed "problem" on the grounds that it was either nonexistent or no longer warranted a regulation,¹³⁷ it cannot now be claimed that the same problem justifies the national TV ownership cap, which is far more sweeping and far less narrowly tailored.

Experience with the *PTAR* also disproves the Commission's suggestion in the *1998 Biennial Report* that independent ownership of stations increases diversity of programming by providing outlets for programming that more clearly serve local interests.¹³⁸ In fact, economic incentives generally drive broadcast stations to air national sources of programming (with the major exception of local newscasts). When stations do not rely on network broadcasts, they almost invariably turn to major national syndicators.¹³⁹ Moreover, in the context of the *PTAR*, it became clear that restricting access to network programming had the perverse effect of reducing investment in "access" period programming and replacing quality network programs with more cheaply produced fare, such as syndicated game shows.¹⁴⁰

Competition – The Commission inquires whether the national TV ownership rule has an impact on the program production market and the advertising market.¹⁴¹ When the Commission voted to repeal the rule in 1984, it had before it the comments of the Department of Justice, which stated that "elimination of the rule [would] pose[] no risk in any market relevant to

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ *See Notice* at ¶ 136 (citing *1998 Biennial Report*, 15 FCC Rcd at 11074-75).

¹³⁹ *See PTAR*, 11 FCC Rcd at 550.

¹⁴⁰ *See id.* at 569-70.

¹⁴¹ *See Notice* at ¶ 138.

antitrust analysis."¹⁴² The Commission itself reached a similar conclusion in that proceeding: "the record establishes that there is no danger of excessive economic concentration in the relevant competitive markets, and that there are potential efficiency gains from repeal of the rule."¹⁴³ The Department's determination and the Commission's conclusion are no less true today.

With respect to the program production market, the Commission queries whether large purchasers of video programming could exercise monopsony power.¹⁴⁴ As *EI Economic Study E* demonstrates, the purchase of video entertainment programming at the national level is no more than moderately concentrated.¹⁴⁵ The study includes as part of the national video entertainment programming market broadcast networks as well as syndicators, cable networks, DBS operators, pay-per-view providers and distributors of videocassettes and DVDs, since each of these media are accessible to the vast majority of American consumers and constitute alternatives to programming on broadcast stations.¹⁴⁶ Given the diverse number of media purchasing video entertainment programming today, and the concomitant lack of concentration in the video entertainment programming market, the Commission's concerns about concentration in this market no longer provide a rationale for maintenance of the national ownership cap.

¹⁴² See *Reply Comments*, Department of Justice, in GEN Docket No. 83-1009, at 1.

¹⁴³ See *In Re Amendment of Section 73.3555*, 100 FCC 2d at 54.

¹⁴⁴ See *Notice* at ¶ 139.

¹⁴⁵ See *EI Economic Study E*, Concentration Among National Purchasers of Video Entertainment Programming, at 1.

¹⁴⁶ See *id.* at 2 ("It is the presence of these alternative delivery systems and their ability rapidly to take dissatisfied viewers away from broadcast television that is important, not their present scale of operation.").

Likewise, the national TV ownership rule, as the Commission fears, limits the ability of networks to innovate in broadcast programming and services.¹⁴⁷ As explained by Professor Michael Katz, former chief economist for the Federal Communications Commission, the national TV ownership rule "harms the public interest rather than protects it."¹⁴⁸ According to Professor Katz, by inhibiting the potential economic efficiencies available to group owners, the rule artificially raises the cost of operating television stations and limits the return that networks can realize on their programming investments. Insofar as "increased profits derived from owned and operated stations are an important factor in determining a network's willingness and ability to bid for costly event programming," the economic distortion caused by the rule "reduces television networks' incentives and abilities to promote and compete for high-quality, high-cost programming dedicated to [free, over-the-air television]."¹⁴⁹ In effect, the rule drives network owners to direct more of their resources away from free television and toward alternative means of distributing programming content, such as subscription-based cable channels.

In short, continuation of the national TV ownership rule will further none of the Commission's stated goals for structural ownership regulation. The Commission long ago recognized that a national rule cannot foster local viewpoint diversity. If anything, the rule harms both localism and competition by hamstringing the most effective local competitors, and chills innovation by distorting investment incentives.

¹⁴⁷ See Notice at ¶ 146.

¹⁴⁸ See Michel L. Katz, *Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition* (September 1999), submitted as an appendix to the Emergency Petition for Relief and Supplemental Comments of Fox Television Stations, Inc., in MM Docket No. 98-35, filed November 18, 1999), at iv.

¹⁴⁹ See *id.* at 56.

B. Elimination of the Dual Network Rule Will Promote Innovation Without Limiting the Continued Availability of National and Local News Services

The Joint Commenters submit that there is no public policy justification for retaining the remaining portions of the dual network rule. As the *Notice* recites, the rule originally was imposed over 60 years ago at a time when there were only two effective network operators, and the main justifications for the restraint were to limit the market power of a particular network and to encourage the emergence of new networks.¹⁵⁰ This rationale retains no validity today, when viewers can choose from nine broadcast networks and hundreds of cable networks.

Diversity – On more than one occasion, the FCC has suggested that the dual network rule is no longer necessary to protect diversity.¹⁵¹ Over the past several decades, the number of nationwide broadcast networks has grown substantially, but even that growth has been overshadowed by the enormous expansion of programming channels delivered to viewers via multichannel video programming distributors ("MVPDs").¹⁵² Yet even the broad and competitive television marketplace is too narrow a backdrop for evaluating the need to retain the dual network rule to serve viewpoint diversity. As discussed above and as demonstrated by several of the *Ownership Studies*, consumers have ready access to a vast array of other media outlets, which can, and do, provide diverse information and views on the critical issues of the day.¹⁵³ Both Study #3 and Study #8 demonstrate that television viewing as a whole has lost

¹⁵⁰ See *Notice* at ¶ 157.

¹⁵¹ See, e.g., *Review of the Commission's Regulations Governing Television Broadcasting*, 7 FCC Rcd 4111, 4117-18 (1992) ("*Review of Television Rules*") (finding that in light of the increase in the number of alternatives to broadcast television, repeal of the rule would pose little risk to the Commission's diversity goals); *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, 10 FCC Rcd 11951, 11967-70 (1995).

¹⁵² See *Video Competition Report*, at ¶ 13.

¹⁵³ See *supra*, Section I.B.2.

ground to Internet surfing.¹⁵⁴ There can be no serious doubt that the Internet provides a direct and readily accessible alternative for consumers in search of diverse sources of information and viewpoints. And, as Dr. Owen argues, consumers will continue to have a plethora of options for obtaining diverse viewpoints (both local and national) even if the dual network rule is eliminated so long as the antitrust and competition laws are properly enforced.

Elimination of the dual network rule also poses no threat to program diversity. The growth in the number and variety of national video providers has resulted in significant erosion in cumulative audience shares for the "Big Four" networks.¹⁵⁵ Study #12 demonstrates that the broadcast networks face fierce competition for viewers from the programming channels available on cable and DBS – and that viewers treat them all as ready substitutes in the provision of news, information and entertainment programming.¹⁵⁶ In this environment the existing network owners should be free to consider any combination that makes possible operating efficiencies and synergies that strengthen their competitive position vis-à-vis MVPDs (to ultimately benefit the viewing public) – subject only to the limitations of properly enforced competition laws.¹⁵⁷

Moreover, as the Commission recognizes, common network ownership can provide owners with "strong incentives to produce a diverse schedule of programming for each set of local TV outlets in the same market."¹⁵⁸ Viacom's experience with common ownership of both

¹⁵⁴ See Study #3, at 3; Study #8, at Table 098.

¹⁵⁵ See *Notice* at ¶ 62. Indeed, the record in several recent Commission proceedings demonstrates that the networks are in significant economic distress. See, e.g., *Amendment of Section 73.658(G) of the Commission's Rules – The Dual Network Rule*, 16 FCC Rcd 11114, 11118 (2001) ("*Dual Network Rule Order*").

¹⁵⁶ See generally Study #12.

¹⁵⁷ See Owen Statement, at 13.

¹⁵⁸ *Notice* at ¶ 160.

the CBS and UPN broadcast networks certainly confirms the Commission's expectations. CBS executives have made clear that UPN will retain an independent identity: "There has been some suggestion that UPN will become CBS2. While [Viacom is] going to make the most of joint opportunities, it is safe to say that is absolutely not going to happen. [Viacom] think[s] there's a growing strength in the UPN brand. It will continue to be an independent brand with a distinct personality and distinct target audience."¹⁵⁹ CBS and UPN have set their sights on entirely different demographics. CBS' programming targets adults 18-49 and 25-54,¹⁶⁰ while UPN focuses on the narrower 18-34-year-old category.¹⁶¹ Thus, Viacom's experience provides strong support for the proposition that common ownership of television networks can lead to increased diversity of programming while providing the owner economic efficiencies that can redound to consumers' benefit.

Study #5 – which charts the failure of the financial interest and syndication ("fin-syn") rules to accomplish their purpose – also suggests that maintaining the dual network rule is not necessary to foster program diversity.¹⁶² The study reveals that diversity is not measurably affected by the number of independent program producers; changes in the availability of formats turn on public taste trends rather than on any market power in the hands of the network buyer.¹⁶³ There is no evidence in the record to suggest that common ownership of two or more networks would change this dynamic. Thus, it should be expected that all network outlets, whether under

¹⁵⁹ See *Networks Seek to Adapt to Changing Business*, Television Digest (January 21, 2002).

¹⁶⁰ See, e.g., Rick Kissell, *No ratings gold for 'Pond,'* Daily Variety (May 1, 2001), at 5; *Fall TV Report*, MediaWeek (September 16, 2002).

¹⁶¹ See Eric Schmuckler, *Special Report: Network Strategies*, MediaWeek (May 27, 2002).

¹⁶² See Mara Einstein, *Program Diversity and the Program Selection Process on Broadcast Network Television* (September 2002), at 33 ("Study #5").

¹⁶³ *Id.* at 36.

common ownership or not, will continue to pursue the often elusive goal of divining audience tastes.

The only possible impact that repeal of the dual network rule might have would be to *advance* the cause of program diversity – by fostering greater specialization by broadcast networks. The FCC already has recognized in the *Dual Network Order* that common ownership of multiple networks creates a powerful economic incentive to differentiate between outlets by diversifying the programming they offer to consumers.¹⁶⁴ Indeed, the Joint Commenters each control multiple cable programming channels aimed at a wide variety of diverse audiences. Consumers clearly benefit from this dynamic, since co-owned networks have greater opportunities to serve audiences with varying tastes.¹⁶⁵ Stated differently, the dual network rule undermines innovation in the programming market.

In short, the dual network rule stifles innovation and fails to advance the Commission's diversity goals.

Competition – The Joint Commenters submit, as Dr. Owen has demonstrated, that there is no reason to approach a combination of two or more of the four major networks differently than a combination of an emerging network with one of the four major networks or, for that matter, than a combination of TV stations: Proper application of the antitrust laws will ensure that competition is preserved in the relevant economic markets (and, hence, in the marketplace of ideas). The *Notice* seeks comment on the effect of mergers among the four major networks on the "program production market" and also notes that it found no harm would result to the "national television advertising market" if an emerging network and one of the four major

¹⁶⁴ See *Dual Network Rule Order*, 16 FCC Rcd 11131.

¹⁶⁵ See *id.*

networks combined.¹⁶⁶ Dr. Owen identified these markets as precisely the kind of "economic markets" best suited to treatment under the Merger Guidelines.¹⁶⁷ Moreover, the Commission has acknowledged that the rule works in a perverse fashion by discouraging broadcast investment to the detriment of consumers of free over-the-air television.¹⁶⁸ In other words, the dual network rule actually undermines the Commission's competition policy goal.

Localism – The *Notice* also seeks comment on whether there is any discernible causal link between the dual network rule and localism.¹⁶⁹ The Joint Commenters submit that, as Dr. Owen argues, proper application of antitrust laws will ensure that a plethora of local outlets will remain available and easily accessible to consumers. To the extent that the Commission remains concerned with localism *per se*, it can rely on the marketplace to ensure that this goal will be served because stations have strong financial incentives to provide local programming (both news and public affairs) regardless of their affiliation with a network.

In sum, in today's multichannel media marketplace – which over the past 60 years has produced an ever-increasing number of local and national newspapers, magazines, and a plethora of Internet sites devoted both to local and national news and commentary, as well as explosive

¹⁶⁶ *Notice* at ¶ 166.

¹⁶⁷ *See* Owen Statement, at 1-2.

¹⁶⁸ *See Review of Television Rules*, 7 FCC Rcd at 4118 (acknowledging that "broadcast networks seeking to become multichannel service providers have confronted certain regulatory barriers to doing so, and those barriers appear to have channeled the networks' activities into non-broadcast enterprises"); *id.* at 4113 (proposing elimination of the rule so as to not "perpetuate unnecessary regulations that impede the competitive ability" of television stations and networks); *id.* at 4118 (concluding that repeal of the rule would not harm diversity due to the proliferation of over-the-air and non-broadcast outlets that provide a "multiplicity of network and other program sources" for consumers); *Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, 10 FCC Rcd 11951, 11956 (1995) (questioning whether the dual network rule "increase[d] the costs of networking without producing any real benefits"); *id.* at 11974 (observing that the dual network rule might "now operate to inhibit development of new broadcast networks and discourage innovation").

¹⁶⁹ *Notice* at ¶ 168.

growth in the field of "all news" and "news/talk" radio – it is hard to imagine a market *less* in need of protection of diversity or competition whether locally or nationally.¹⁷⁰ In light of the requirement of Section 202(h) that rules must be *necessary* to be retained, the dual network rule must be repealed.

C. The Commission Should Repeal the Local TV Multiple Ownership Rule Since Both Economic Theory and Empirical Evidence Establish that Common Owners of Same Market TV Stations Have Incentives to Diversify Programming and Viewpoints

As the *Notice* indicates, the local TV multiple ownership rule originally was intended to preserve viewpoint diversity and promote competition in local markets.¹⁷¹ The rule – which precludes any entity from owning more than two television stations in the same market, regardless of whether the market has 9 or 29 independent television voices, the state of television and media competition in the market, and the relative competitive strength of the stations to be commonly owned – sweeps far too broadly.¹⁷² In practice, proper application of the antitrust laws will sufficiently protect competition in local markets, and the rule, by preventing efficiencies arising from common ownership, may be causing more harm than good with respect to the Commission's goals.

¹⁷⁰ In today's marketplace, the Commission lacks any reasoned basis for insisting that network news operations stand as uniquely important outlets for purposes of viewpoint formation. *See Notice* at ¶ 162. The media consumer today can turn to a multitude of different forms of national news, including round-the-clock cable news channels, the national "segments" of local news broadcasts (which routinely occur at more times throughout the morning and evening), newspapers, and the Internet, for national news. Moreover, additional sources, including raw footage and commentary and opinion on important political issues (such as C-SPAN) may have an even greater influence on viewpoint formation than the more traditional news reports provided by national network news and other outlets.

¹⁷¹ *See Notice* at ¶ 78.

¹⁷² *See* Petition for Rulemaking of National Broadcasting Company, Inc., *Amendment of Part 73 of the Commission's Rules to Modify Section 73.3555(b) of the Regulations Concerning Multiple Ownership of Broadcast Stations* (submitted August 26, 2002).

Diversity – The Commission explains in the *Notice* that "with respect to viewpoint diversity," the thrust of the local TV multiple ownership rule was to "avoid combinations of two stations offering separate local newscasts," based on the FCC's "analysis" that only the top four stations in a market generally have a local newscast.¹⁷³ But the *Sinclair* decision, in which the court struck down the rule because the Commission failed to justify its narrow definition of voices, has rightly challenged the unexamined assumption that broadcast television remains a singular source for local news.¹⁷⁴

The local media marketplaces in cities and towns across the United States boast a tremendously competitive array of effective communications outlets, all of which produce a rich mix of locally oriented content. Local television stations by no means hold an exclusive ability to present diverse local viewpoints. Rather, consumers can access a wide variety of non-broadcast sources to obtain local news and information. In addition, there is a substantial and important overlap between issues of local and national importance. Many local issues – including crime, education, health care, race relations, and a host of others – are comprehensively addressed by an abundance of national as well as local media outlets, which consumers use interchangeably.¹⁷⁵

The *Notice* correctly questions, however, whether the Commission should focus on news and public affairs programming to the exclusion of other types of programming.¹⁷⁶ As the Joint Commenters have demonstrated, any effort by the Commission to rely narrowly on news and

¹⁷³ See *Notice* at ¶ 78.

¹⁷⁴ See *Sinclair*, 284 F.3d at 163-65.

¹⁷⁵ For example, the "local" issues noted on broadcast station "issues/programs" lists usually are of this character – *i.e.*, they are routinely addressed in network and nationally syndicated programming, as well as in purely local newscasts. See also Study #3.

¹⁷⁶ *Notice* at ¶ 40.

public affairs as the sole indicia of viewpoint diversity would be constitutionally suspect and would inappropriately ignore the powerful impact that entertainment and other types of programming have on Americans' viewpoint formation.

Nonetheless, even if the Commission continues to insist on using local television news as the key barometer of its viewpoint diversity analysis, there is ample evidence to support repeal of the local TV multiple ownership rule. As demonstrated by EI in *Economic Study A*, there are numerous television stations not ranked among the top four in a market that carry local news programming, and the "average household in the United States lives in a DMA with 6.1 sources of local broadcast television news."¹⁷⁷

The Commission also seeks comment on the manner in which the rule specifically promotes "program diversity."¹⁷⁸ The FCC correctly points out that "a single owner of multiple outlets may have stronger incentives to provide diverse entertainment formats, programs, and content on its multiple outlets than would separate station owners."¹⁷⁹ As discussed in detail above, the Commission in both the *1991 Radio Ownership Proceeding* and the *1995 TV Ownership Proceeding* accepted the principle – supported by a wealth of economic data – that single owners of multiple media outlets have financial incentives to diversify their program offerings.¹⁸⁰ The *Notice* questions whether a single owner would be equally likely to promote diverse views in the context of news and public affairs programming. There is no basis,

¹⁷⁷ See *EI Economic Study A*, News and Public Affairs Programming Offered by the Four Top-Ranked Versus Lower-Ranked Television Stations, at 1-2.

¹⁷⁸ *Notice* at ¶ 82.

¹⁷⁹ *Notice* at ¶ 82.

¹⁸⁰ See *supra*, Section I.B.4. This principle also formed the basis for the Commission's relaxation of the dual network rule. See *Notice* at ¶ 160, citing *Dual Network Order*, 16 FCC Rcd at 11131 (Commission finding it "likely that [a] common owner would have strong incentives to produce a diverse schedule of programming for each set of local TV outlets in the same market").

however, to assume that a single owner would behave any differently in the context of news programming.¹⁸¹ In this regard, the *Notice* refers to the testimony before Congress of the chief operating officer of Viacom, who explained, in the Commission's words, that "TV stations determine locally how much news to air, what stories are run, and when they are aired."¹⁸² In addition, as Chairman Powell observed, "What does the owner get for having duplicative products? I don't know why you'd want to have two newspapers that say the same thing. I would say, 'Let's make one Democratic and one Republican.'"¹⁸³ The Chairman's logic applies with equal force to common ownership of television stations.¹⁸⁴ For all of these reasons, the Joint Commenters believe that elimination of the local TV ownership rule will promote the Commission's goal of program diversity.

Localism – Furthermore, elimination of the rule supports the Commission's localism goal. The *Notice* asks whether "the local TV ownership rule affect[s] either the quantity or quality of local news and other programming of local interest produced and aired by local stations."¹⁸⁵ Specifically, in a study conducted to determine the effect of common ownership on local news carriage, EI found that "[s]tations that are part of a commonly owned local station group . . . are significantly more likely to carry local news than other stations, even after controlling for other

¹⁸¹ Indeed, Study #2 specifically determined that in a number of cases, commonly-owned newspapers and television stations provided different viewpoints in their coverage of the 2000 presidential election. *See generally* Study #2.

¹⁸² *Notice* at ¶ 81, citing *Testimony of Mel Karmazin, president and chief operating officer of Viacom, Inc., Before the Senate Committee on Commerce, Science and Transportation (July 17, 2002)*, 2001 WL 808306 at 7 (F.D.C.H.) ("Our stations' news directors have complete freedom locally. This is a fundamental CBS policy. And it is good business.").

¹⁸³ *See* Jim Rutenberg, *Fewer Media Owners, More Media Choices*, *The New York Times*, at C1 (December 2, 2002).

¹⁸⁴ *See generally*, Study #2.

¹⁸⁵ *Notice* at ¶ 95.

factors."¹⁸⁶ In other words, even after accounting for the multiple dynamics that influence a station's decision whether to carry local news (*e.g.*, the size of the market), EI concluded that commonly owned stations are more likely to carry local news programming.¹⁸⁷ Accordingly, the local TV multiple ownership rule fails to advance the Commission's localism goal.

Competition – Additionally, the *Notice* asks for comment on the role the local TV multiple ownership rule plays in furthering the FCC's competition goals in the advertising, delivered video and video program production markets.¹⁸⁸ As the Joint Commenters already have demonstrated, reliance on the antitrust laws will adequately ensure that all three of these markets will remain unconcentrated and competitive. The media-specific local TV multiple ownership rule, premised on a technology-centric market definition, disserves the public interest by preventing transactions that promote diversity and that otherwise would be permissible under the antitrust laws.¹⁸⁹

¹⁸⁶ See *EI Economic Study B*, Effect of Common Ownership or Operation on News Carriage, Quantity and Quality, at 2.

¹⁸⁷ Moreover, EI determined that "the higher the number of stations owned by the same owner, the more likely it is that the owner's stations offer news programming." *Id.* at 7-8.

¹⁸⁸ *Notice* at ¶¶ 86, 89 and 93.

¹⁸⁹ Study #10 concludes that "estimated ordinary cross-price elasticities suggest weak substitutability between local media" which would mitigate against relaxation of the local TV ownership rule. See C. Anthony Bush, *On the Substitutability of Local Newspaper, Radio and Television Advertising in Local Business Sales*, September 2002 ("Study #10") at 3. As EI demonstrates, however, Study #10 contains fatal flaws that preclude it from serving as the basis for any policy conclusions. See *EI Economic Study C*, Comments on FCC Ownership Study #10, at 1-2. In particular, EI criticizes the study for: (i) using national radio and television advertising prices rather than local prices; (ii) lacking a local measure of newspaper advertising expenditures (the proxy measure is not supported by evidence and may significantly distort the results); (iii) using meaningless "cost per point" television and radio prices, since the audience represented by a "point" varies between television and radio within a DMA and, within television or radio, across DMAs; (iv) failing to adjust newspaper advertising prices for audience size and inappropriately averaging newspapers of different sizes; (v) failing to control for non-price media characteristics that might affect the choice of advertising media; and (vi) incorrectly stating advertising expenditures on a per-business establishment basis. See *id.*

D. FCC Study #2 Demonstrates that Common Ownership of Newspapers and Broadcast Stations in A Single Market Poses No Threat to Viewpoint Diversity

Although the newspaper/broadcast cross-ownership rule ("NBCO Rule") remains the subject of a separate, pending proceeding, the Commission's *Notice* asks for comment on the rule to the extent necessary to address new developments.¹⁹⁰ One extremely significant development has occurred since the Commission accepted comments on the NBCO Rule. Specifically, the findings in Study # 2, discussed in detail above, confirm that "common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary on important political events between the commonly owned outlets."¹⁹¹ Indeed, the study found that in five of the ten markets studied, "the overall slant of the coverage broadcast by a company's television station was noticeably *different* from the overall slant of coverage provided by the same company's newspaper, and often contradicted the newspaper's endorsement of a candidate."¹⁹²

The findings provide strong support for the arguments – made by a number of commenters in response to the *NBCO Rule NPRM* – that commonly-owned newspapers and broadcast stations do not speak with a single, monolithic voice.¹⁹³ Day-to-day editorial decisions regarding the presentation and packaging of news and information are not dictated from above by the media owner, but rather these decisions are made by the news director at individual stations and the editorial staff at a particular newspaper. Accordingly, as confirmed by the

¹⁹⁰ *Notice* at ¶ 7. *See also NBCO Proceeding NPRM.*

¹⁹¹ *See Study #2*, at 11.

¹⁹² *See id.* at 8 (emphasis added).

¹⁹³ *See, e.g.,* Comments of The News Corporation Limited and Fox Television Holdings, Inc., in MM Docket Nos. 01-235 and 96-197, filed December 3, 2001, at 20-23, and Comments of Tribune Company, in MM Docket Nos. 01-235 and 96-197, filed December 3, 2001, at 42-47.

record developed in response to the *NBCO Rule NPRM*, and as reinforced by Study #2, common ownership of newspapers and broadcast stations in a single market in no way threatens viewpoint diversity in the marketplace of ideas.¹⁹⁴

E. The FCC *Ownership Studies* Confirm that Elimination of the Local Radio Ownership Rule Poses No Threat to the Commission's Policy Goals and Will Likely Advance Those Goals

The *Notice* seeks comment on the local radio ownership rule – which is also subject to a separate proceeding currently pending at the Commission – only to the extent necessary to address any recent developments.¹⁹⁵ Perhaps the most significant development affecting the local radio ownership rule is the release of the *Ownership Studies* in this proceeding. As the Commission acknowledges in the *Notice*, the local radio ownership rule – like all of the Commission's local media ownership rules – is premised on the notion that it will foster competition and diversity in the local media marketplace.¹⁹⁶ Several of the *Ownership Studies* directly confront this issue and reveal that recent changes to the local radio ownership rule as a result of the 1996 Act, which permitted further consolidation in the radio industry, have had no untoward effects on either competition or diversity in radio markets.

Study #4, for example, analyzes the effect of local and national radio concentration on real advertising rates between 1996 and 2001.¹⁹⁷ The authors find that national concentration did not affect local advertising prices and that a greater presence of large national owners in a local

¹⁹⁴ See also *supra*, Section I.B.4.

¹⁹⁵ *Notice* at ¶ 7. See also Comments of Viacom, in MM Docket No. 01-317, filed March 27, 2002.

¹⁹⁶ *Notice* at ¶ 8.

¹⁹⁷ Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets*, September 2002 ("Study #4").

market tends to *lower* advertising prices.¹⁹⁸ Although Study #4 concludes that increases in local concentration following adoption of the 1996 Act modestly increased prices for local advertising, EI's studies cast doubt on the accuracy of this conclusion for two reasons. First, Study #4 fails to control for changes in the quality or attractiveness of radio advertising as perceived by advertisers.¹⁹⁹ In this regard, EI notes that "[o]ne goal of consolidation was to make radio advertising a better (*i.e.*, higher quality) product and this may explain some or all of the price increase attributed to local consolidation."²⁰⁰ More importantly, however, the authors fail to account for conditions in other media advertising markets during the relevant time period, which could cause the measured effect of consolidation to be overstated.²⁰¹

As for diversity, Study #9²⁰² and Study #11²⁰³ both indicate that programming diversity has not been adversely affected by radio consolidation since the adoption of the 1996 Act. Study #9, for example, concludes that song diversity – whether measured as the number of unique songs played in a market or the difference between top ten playlists on radio stations in a market – has remained stable between 1996 and 2001.²⁰⁴ Study #11 likewise concludes that,

¹⁹⁸ Study #4 at 2, 18. Moreover, a study conducted by Professor Jerry A. Hausman determined that consolidation of radio ownership following the 1996 Act did not lead to higher advertising rates. *See* Comments of Viacom, in MM Docket 01-317, filed March 27, 2002, at Exhibit 3. Dr. Hausman further found that decreases in the number of owners in a given radio market actually lead to increases in the number of formats available in that market. *Id.*

¹⁹⁹ *See EI Economic Study D*, Comment on FCC Ownership Study #4, at 1-2.

²⁰⁰ *Id.*

²⁰¹ *See id.*

²⁰² *See* George Williams, Keith Brown, and Peter Alexander, *Radio Market Structure and Music Diversity*, September 2002 ("Study #9").

²⁰³ *See* George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance*, September 2002 ("Study #11").

²⁰⁴ *See* Study #9, at 17.

notwithstanding the extensive consolidation in the radio industry, the variety of radio formats available to consumers has remained steady since 1996.²⁰⁵

In sum, consolidation in the radio industry has not had a detrimental effect on either competition or diversity in national or local radio markets and, if anything, has lowered prices in local advertising markets. By extension, therefore, the Commission must conclude that abandonment of the local radio ownership rule – given the availability of the antitrust laws – will not undermine its policy goals and, in fact, likely will advance those goals.

F. As the Notice Suggests, the Radio/TV Cross-Ownership Rule, Evaluated in Light of the Modern Media Marketplace, Should be Eliminated

The radio/TV cross-ownership rule counts as media voices non-broadcast media including daily newspapers and cable systems as well as all broadcast stations.²⁰⁶ In the *Notice*, the Commission correctly observes that this limitation "implies that only these particular types of media contribute to viewpoint diversity."²⁰⁷ The Commission asks, therefore, whether the rule should "account for news available on Internet Web sites, DBS, cable overbuilds, magazines or weekly newspapers."²⁰⁸ If so, the Commission asks whether the rule is unnecessary.

The court in *Sinclair* struck down the local TV multiple ownership rule because the rule defines voices even more narrowly than the radio/TV cross-ownership rule (*i.e.*, the local TV multiple ownership rule takes into account only TV stations). As the *Notice* suggests, the

²⁰⁵ See Study #11, at 7.

²⁰⁶ See Petition for Rulemaking of Viacom, *In Re Part 73 of the Commission's Rules to Repeal Section 73.3555(c) of the Regulations Concerning Multiple Ownership of Broadcast Stations, the Radio-Television Cross-Ownership Rule* (submitted May 23, 2002).

²⁰⁷ *Notice* at ¶ 102.

²⁰⁸ *Notice* at ¶ 102.

definition of voices in the radio/TV cross-ownership rule is no less subject to question.²⁰⁹ Not only does the record show that consumers have a multitude of news outlets, Study #8, as noted above, demonstrates that consumers utilize a wide variety of media, including the Internet and magazines. Study #8, moreover, confirms the findings of Study #3 that consumers use multiple media sources, and readily substitute Internet usage for television viewing.²¹⁰

Given the number of outlets available to today's consumers, the Joint Commenters believe that the radio/TV cross-ownership rule is unnecessary. However, to the extent that the Commission retains any regulation beyond reliance on the antitrust laws as a means of ensuring viewpoint diversity, the Joint Commenters believe, as discussed below, that the Commission should, as suggested in the *Notice* with respect to the radio/TV cross-ownership rule, take into account *all* of the available outlets in the modern media marketplace.

III. ANY STRUCTURAL OWNERSHIP REGULATION MUST ESTABLISH A MINIMUM LEVEL OF OUTLET DIVERSITY NO GREATER THAN IS "NECESSARY IN THE PUBLIC INTEREST"

The facts now before the Commission – including the *Ownership Studies*, the EI Economic Studies, as well as the statement of Dr. Owen – amply demonstrate that market forces coupled with antitrust enforcement are more than adequate to protect the agency's legitimate public interest objectives. Nevertheless, some commenters in this proceeding may contend that a particular transaction could raise questions as to concentration in the marketplace of ideas even though the acquisition complies with the Merger Guidelines.²¹¹ While the Commission should

²⁰⁹ See *Notice* at ¶ 17.

²¹⁰ See generally Study #3.

²¹¹ See Owen Statement, at 4. As discussed above, any such regulation would be designed for the purpose of safeguarding the Commission's "touchstone" goal of viewpoint diversity. See *supra* Section I.B.1. As such, neither "competition" nor "localism" can serve as an independent basis for such a rule. While competition remains a legitimate governmental concern, Section 202(h) effectively bars the FCC from imposing rules that are, *per se*, aimed at duplicating existing state and federal antitrust enforcement. Indeed,

harbor no residual concern about a theoretical lack of competition in the marketplace of ideas when there is sufficient competition in economic markets, the Joint Commenters review several key factors that would necessarily limit, and give shape to, any regulation that attempts to address this concern. We submit, however, that our review of these factors – rather than supporting Commission intervention into the marketplace of ideas – confirms the conclusion that reliance on the Merger Guidelines more than suffices to achieve the Commission's objectives.

A. Ownership Regulation Cannot Satisfy the Deregulatory Presumption of the 1996 Act Unless It Is Unitary and Technology-Neutral, Encompassing All Media that Contribute to Viewpoint Diversity

Application of the deregulatory presumption of the 1996 Act to the state of the media marketplace today makes several limiting factors immediately apparent. First, in view of the immense range and variety of national media that are accessible from virtually any point in the United States, local media markets provide the only conceivable point of focus for continued regulatory endeavors. Second, given the fact that individual consumers value and use numerous different media sources every day, there is no principled basis for adopting media-specific rules. Third, there is no factual predicate for a government-established rule that places a higher value on one medium than another or that favors one type of content (*i.e.*, news and information programming) over other content. Accordingly, any conceivable rule – if a rule can be justified at all as "necessary" to serve the public interest – must focus on local media markets and be

such "belt and suspenders" duplication would be a quintessential example of regulation that is not "necessary" under any reasonable interpretation of that term. Similarly, the Commission's localism goals are amply served by marketplace incentives as well as by Commission policy obligating broadcasters to serve the needs and interests of their local communities. *See Notice at ¶ 150 (citing Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 F.C.C.2d 1075, 1091-92 (1984)).*

unitary in nature, thereby encompassing *all* media that contribute to viewpoint diversity on matters of "local" interest.²¹²

Any rule must take into account the wide range of media that are accessible to consumers in local markets. As noted above, the local marketplace is the only demonstrably relevant geographic market. In light of the emergence of revolutionary new media, including the Internet, as well as the proliferation of outlets in "old" media such as print and broadcasting, even consumers in smaller markets enjoy a great abundance of locally oriented media choices at affordable costs. The evidence set forth above also demonstrates that an individual American typically makes use of many different types of media²¹³ – often at the same time – and that all such outlets contribute to the diversity of information and ideas that she or he enjoys.²¹⁴ Any regulation therefore must encompass, at the very least, all local media outlets that contribute to viewpoint diversity: both commercial and noncommercial full-power television stations, low-power television stations (including Class A), commercial and noncommercial radio stations, daily and weekly newspapers, cable television systems and their public access channels, local and regional magazines, and Internet Web sites with local content.²¹⁵ Without question, all of

²¹² In addition to these limiting principles, there are substantial conceptual issues that the Commission would have to resolve if it wished to retain some form of diversity-related regulation. Chief among these is the question of what interests or activities it would seek to regulate as a means of advancing its interest in viewpoint diversity. As discussed above, the FCC has looked upon outlet ownership diversity as a surrogate for achieving its ultimate policy objective. But the record now before the Commission raises fundamental doubts that outlet diversity can, in fact, be relied upon as a means of achieving the ultimate goal of viewpoint diversity.

²¹³ See *supra* Section I.B.2 for a discussion of data in FCC Study #8 showing that aggregated media usage greatly exceeds 100%, which supports the commonplace observation that most Americans regularly make use of a broad mix of media.

²¹⁴ The current medium-specific regulations are flawed in two respects. First, they grossly under-count the rich variety of sources of information and opinion that are available to today's consumers. Second, by generally treating each medium as though it operates in isolation, the current rules do not account for the complex way that media outlets compete and interact with one another in contributing to the viewpoints that Americans form and hold. See *supra* Section I.B.2.

²¹⁵ Each of these media should be taken into account regardless of the language in which they are offered.

these outlets contribute to the Commission's ultimate goal of viewpoint diversity. In addition, all are accessible by local consumers and provide or have the potential to provide local content.²¹⁶

Any regulation must also be sufficiently flexible to accommodate the impact of new technologies on the media marketplace. The rapid rise of the Internet as a competitive platform for the delivery of a nearly infinite range of ideas and information should serve as a cautionary example: The Commission should not engrave any itemized list of relevant media outlets into a rule but rather automatically provide for recognition of new media as developments warrant.

Each medium must be accorded equal weight for diversity purposes. As Dr. Owen argues, all media outlets are comparable in terms of their ability to transmit viewpoints and information that a given consumer may value.²¹⁷ In a democracy, moreover, there is no basis for the government to try to rank the influence of different speakers; rather, its interest should be fully satisfied so long as diverse viewpoints are available to and accessible by the American people.

In this regard, "the keys are to identify the outlets for ideas to which a particular group of consumers can readily turn in the event its current supplier(s) raise price, lower quality or

²¹⁶ Even this formidable list understates the numerous sources that supply consumers with ideas and information. The record demonstrates that interpersonal communications – ranging from old-fashioned, over-the-fence backyard conversations to continent-to-continent e-mail exchanges – have a profound effect on the way that consumers process all the information and viewpoints they receive. Moreover, the plethora of national outlets now available in all local markets, including broadcast and cable programming networks, DBS-specific audio and video programming, and national and international publications and Web sites, makes a significant, demonstrable contribution to the information and ideas that consumers receive. These "national" media routinely explore many of the same issues that are of critical importance at the "local" level – e.g., crime, drugs, health, education, transportation, and the economy. This presents the FCC with a critical dilemma. On the one hand, if it fairly takes account of the important role of the national media in influencing "local" viewpoint diversity – as it should – the number of relevant media outlets would immediately be so large as to obliterate the case for regulation *anywhere in the United States*. On the other hand, if it ignores this influence, the regulatory scheme would be founded on a premise that is seriously detached from reality and, therefore, not necessary as a result of competition.

²¹⁷ Dr. Owen also urges the Commission to reexamine – and abandon – the historical reliance upon "spectrum scarcity" as a reason to regulate broadcasting differently than other media. Owen Statement, at 5-6.

otherwise prove unsatisfactory, and to assess ease of entry by new outlets."²¹⁸ Unlike economic markets where competing firms' shares of relevant markets – *e.g.*, advertising revenues or audience share – often have great significance in determining the likely effect on consumers of a particular merger (because market share influences pricing incentives), in the marketplace of ideas "what matters is the number of alternative information outlets available to consumers, not the current popularity, much less the technology of transmission, of the idea currently communicated by each outlet."²¹⁹

Given that each source of ideas available to a consumer is equally significant from a First Amendment perspective, "[t]he rational way to measure the 'share' of each source of ideas available to a given set of consumers, therefore, is to give each source *equal weight*."²²⁰ In short, the definition of the market in the "marketplace of ideas" must include all media that are accessible to a given set of consumers and each form of media (*e.g.*, broadcast, cable, Internet) must be given equal weight:

It makes no sense to say that a particular media outlet that has a large audience controls access to that audience, unless members of that audience are inaccessible to other media. As the evidence in this proceeding shows, audiences are accessible to many media and many media are accessible to audiences. In short, the audience of a media outlet is unrelated to that outlet's significance in the marketplace of ideas. *Every outlet available to the community has equal potential as a source of ideas.*²²¹

There is therefore no principled basis upon which to assign differing regulatory "values" to different media, and any residual rule should be "unitary" among all media, incorporating a technology-neutral scheme that weights outlets only on the basis of whether (1) a consumer may

²¹⁸ *Id.* at 7.

²¹⁹ *Id.* at 8.

²²⁰ *Id.* (emphasis added).

²²¹ *Id.* at 9 (emphasis added).

access the outlet in the local market, and (2) the outlet includes, or has the capability to include, local content. No other proxy measure of relative importance could be justified.

For example, ranking media according to advertising revenues fails to account properly for many noncommercial media, which contribute very substantially to viewpoint diversity, as well as subscription-based services, ranging from daily newspapers to premium program services (*e.g.*, HBO) to commercial-free services (*e.g.*, TCM, Noggin, Internet Web sites). Use of penetration or subscription rates also fails as a proxy measure because many consumers who have the financial wherewithal to use a certain medium simply choose not to do so for non-financial reasons. Similarly, use of ratings – or some other measure of an outlet's popularity – ignores the contribution to viewpoint diversity made by less-popular ideas. Nor would use of data concerning the average time spent with a particular medium suffice because the attributes of individual outlets plainly affect that measure: a consumer seeking a local news or weather update (or the views of a favorite commentator) need only spend a few seconds accessing that information via the Internet but might have to wait until the end of an entire newscast to receive the same data.

Any rule must establish a minimum level of outlet diversity "necessary in the public interest." The deregulatory presumption of Section 202(h) requires the Commission to repeal media ownership rules, unless they are "necessary in the public interest as the result of competition." If the Commission determines that, notwithstanding the overwhelming evidence of fierce competition and ubiquitous availability in today's media marketplace, a rule is nonetheless necessary to address any remaining concerns (however theoretical), the Joint Commenters suggest that the Commission explore a safe-harbor approach. For purposes of discussion here, the Joint Commenters assume *arguendo* that in crafting and applying this

approach, the Commission could both accurately identify all relevant outlets in a local market and determine how much diversity would be minimally sufficient.²²²

First, any such "unitary" rule could establish a bright-line benchmark to determine whether FCC review of the impact of a transaction on the marketplace of ideas is needed at all. As Dr. Owen suggests, the Commission should be guided by the Merger Guidelines in establishing a minimum number of outlets to ensure adequate competition in the marketplace of ideas. By selecting an appropriate minimum number of independently owned outlets as a benchmark, the Commission would create a simple "safe harbor" in which any proposed acquisition would automatically be approved – so long as it would leave at least the prescribed number of independent voices post-transaction.²²³ Common sense and economic theory also underscore that this safe harbor should be the same for all markets, whatever their size – there is no principled basis for deeming New Yorkers to require a higher number of diverse outlets than residents of North Dakota. In calculating whether the benchmark has been exceeded, all local media would be counted equally, except for weighting to account for geographic availability. Second, if a proposed transaction results in a number of independent "voices" below the safe-harbor benchmark, it would still be permitted upon a further showing by the applicants. Factors

²²² The D.C. Circuit has signaled that it is not permissible for the agency to evade the difficult question of "how much diversity is enough." *Sinclair*, 284 F.3d at 170 (Sentelle, concurring and dissenting in part). Indeed, the Court has expressly rejected the idea that the Commission may impose "illimitable restrictions in the name of diversity." *Time Warner Ent'mt Co. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001). For example, with respect to the cable horizontal ownership rules, the Court found that the FCC had failed to show that its diversity interests justified regulations guaranteeing the existence of more than two separately owned cable operators. *Id.* at 1134-35. It is worth noting here that our country's Founders put their full faith in freedom of expression at a time when the American colonies had a very low level of penetration by what has come to be considered the "old" media. *See, e.g.*, Bernard Bailyn, *The Ideological Origins of the American Revolution*, 1 (1967) (only 38 regularly published newspapers in all of British North America in 1775). For this reason, colonists relied mainly on their era's version of group e-mail messages – *i.e.*, pamphlets – to carry the Revolutionary message. *Id.* at 21.

²²³ In order to explore the feasibility of a bright-line benchmark, the "unitary rule" treats all commonly-owned outlets as having the same viewpoint, despite the compelling evidence that suggests common ownership does not result in monolithic viewpoints. *See supra*, Section I.B.4.

relevant to that showing might include more detailed information demonstrating that the true scope of viewpoint diversity is far greater than would be indicated merely by the number of outlets in the relevant local "marketplace of ideas," as well as an analysis of regional and national sources that provide content of local significance.

B. An Illustrative Application of the "Unitary Rule" Demonstrates That Combinations Permissible Under the Antitrust Laws Are Highly Unlikely to Threaten Competition in the Marketplace of Ideas

In order to illustrate how such a unitary rule might apply in a specific case, the Joint Commenters asked EI to undertake a preliminary review of the local media marketplace in the Milwaukee, Wisconsin metropolitan area (the 31st largest DMA). Operating on the premise that only outlets capable of and likely to provide local content should be counted, EI used readily available sources such as industry publications and Internet search engines to identify local media outlets and their owners.²²⁴ The resulting universe of outlets included only those daily newspapers, weekly newspapers, full- and low-power commercial and noncommercial television stations, commercial and noncommercial radio stations, cable television systems and public access channels, local and regional magazines, and local Internet Web sites centered in or providing content relevant to the Milwaukee marketplace.²²⁵ Each outlet was weighted equally in the resulting calculation except with respect to geographic availability, which was taken into consideration.²²⁶

²²⁴ See *EI Economic Study F, Counting Outlets and Owners in Milwaukee: An Illustrative Example*, at 2-7.

²²⁵ As Dr. Owen notes, "politically, socially or otherwise significant information can enter the marketplace of ideas through a single Web site, newsgroup or chat room and be disseminated extremely widely among the community." Owen Statement, at 13.

²²⁶ Thus, for example, Arbitron-defined local radio markets were taken into account, as were likely distribution areas of weekly newspapers. See *EI Economic Study F*, at 3, 5.

Looking only at media that reach the entire DMA (broadcast television, regional magazines, and local Internet sites), EI concluded that the average household in the Milwaukee area has over 170 outlets available.²²⁷ These outlets have nearly 90 separate owners; in portions of the DMA, when radio stations and daily and weekly newspapers are taken into account, many more independent outlets may be available.²²⁸ Accordingly, any reasonable safe-harbor benchmark – whether the HHI index of the Merger Guidelines or some other formulation – incorporated into a unitary rule would permit numerous combinations among these outlets before the Commission would be required to engage in any further, more detailed review of the impact of any particular transaction upon the marketplace of ideas in Milwaukee. Put differently, it is highly unlikely that any combination permissible under the antitrust laws would threaten competition in the marketplace of ideas.

In sum, this "unitary" rule approach to crafting and applying a regulatory safeguard could, as a conceptual matter, serve the Commission's policy goals while maximizing its potential for surviving judicial review.

²²⁷ *See id.* at 8.

²²⁸ *See id.*

CONCLUSION

The Joint Commenters applaud the Commission for initiating this sweeping review of the structural regulatory regime that has dominated its oversight of media ownership for six decades. The Commission also should be applauded for recognizing that the world has changed dramatically in the last 60 years. American consumers today have unprecedented access to a diverse array of media choices that would have been utterly unfathomable when most of the Commission's ownership rules were first put into place. As the Commission rightfully recognizes, time does not stand still and – particularly in light of the deregulatory mandate of Section 202(h) – legacy regulations that no longer serve the public interest must be eliminated.

As thoroughly demonstrated by the economic studies submitted herewith as well as the *Ownership Studies*, the time has come for the Commission to rely on market forces in lieu of unnecessary and counterproductive structural regulations. The Joint Commenters submit that the Commission should embrace this momentous opportunity to align its oversight of media ownership with the realities of the modern world, and in doing so provide broadcasters with the opportunity to compete effectively in today's ferociously competitive media marketplace.

Ultimately, a market-oriented approach will best serve the public interest by ensuring both vigorous competition and realization of the Commission's policy goals.

Respectfully submitted,

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